IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY FLORIDA

CASE NO.: 95-00934 CA

DIVISION CV B

GRADY CARTER and
MILDRED CARTER,

Plaintiffs

vs.

BROWN & WILLIAMSON TOBACCO
CORPORATION, as successor by
merger to THE AMERICAN TOBACCO
COMPANY

Defendant.

PROCEEDINGS before The Honorable Brian J Davis, held in Courtroom No 2, Duval County Courthouse, Jacksonville, Florida, on Thursday, August 1, 1996, at 9 05 a.m before Sandra Crowley, CSR, RMR, and Notary Public in and for the State of Florida at Large.

INDEX

WITNESS GRADY M CARTER
Page

CROSS EXAMINATION (Continued)
By Mr Riley 2361
REDIRECT EXAMINATION
By Mr Maxwell 2376

WITNESS MILDRED CARTER

DIRECT EXAMINATION
By Mr Maxwell 2397
CROSS-EXAMINATION
By Mr Prichard 2415

PROCEEDINGS

Thursday, August 1, 1996 9 05 a.m.

THE BAILIFF All rise This court is again in session. Be seated, please

THE COURT Good morning Good morning, gentlemen Ready to proceed?

MR MAXWELL Ready for the plaintiffs, sir

MR RILEY Ready, Your Honor.

THE COURT Bring the jury in

(Jury present at 9 05 a m)

THE COURT Please be seated

MR RILEY May I proceed?

THE COURT Good morning, lady and gentlemen We're going to continue with Mr Carter's testimony this morning Mr Riley, you're on cross-examination

Mr Carter, I'll remind you that you remain under oath, sir

THE WITNESS Yes, sir

GRADY M CARTER,

having been produced and previously sworn as a witness, testified as follows

CROSS-EXAMINATION (Continued)

BY MR RILEY

Q Good morning, Mr Carter How are you?

A Fine

Q Mr Carter, I'll be as brief as I can this morning You mentioned yesterday that you had read in the newspapers some statements by tobacco spokesmen, do you recall that?

A Yes

Q You can't tell us the dates of those statements, can you, specifically?

A No, I'd say it's sometime in the '60s

Q You can't say -- you can't name the spokesman, can you?

A No, I can't.

Q You can't say that those statements were made by or on behalf of American Tobacco Company, can you?

A I don't remember the words They were the spokesman for the tobacco company or some institute from the tobacco company that was speaking, I assume, for the entire tobacco industry.

Q You don't know, though?

A I have no way of proving that.

Q And you don't -- you can't tell whether those statements were made by or on behalf of Brown and Williamson, can you?

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2363

A As I understood, it was made -- the statements was made for all the tobacco people.
Q But you don't know who they were made on behalf of, do you?
A I can't tell you that Brown and Williamson said this or Lucky Strike said that, but I do recall it was the tobacco institute or the tobacco industry, someone speaking for the tobacco company, as I recall
Q Do you know whether those statements were made specifically by or on behalf of Brown and Williamson?
A I couldn't tell you that
Q Okay Now, one of the things you told Mr Maxwell yesterday was that you felt American Tobacco Company was responsible for not advising you of the hazards of smoking back in 1947?
A For the health hazard and the addiction to nicotine
Q And let me ask you this. What would you suggest they should have told you? Should they have given you the views of the United States Surgeon General back at that time?
A No, sir They should have told me what they knew at that time

Page 2364

Q Well, do you think they should have given you the views of the director of the National Cancer Institute back at that time?
A They were the maker of the products The Surgeon General didn't make tobacco
Q Do you think it would have been appropriate for them to provide to you the views of the president of the American College of Chest Physicians back at that period of time?
A They should have gave me the views of the information that they had, Mr Riley.
Q Well, do you think it would have been appropriate to give you the views of the medical director of the American Cancer Society or the American Medical Association?
A It would have been more informative to me had the American Tobacco Company said this product will kill you This product, you will be addicted to it. Once you smoke these cigarettes, you will be unable to quit.
Q The question simply is, do you think it would have been appropriate to give you the views of those various health groups and health officials that I mentioned to you? Do you think that would have been an appropriate thing to do?

Page 2365

A Yes. And I think it would if it said endorsed by Lucky Strikes -- makers of Lucky Strike cigarettes.
Q Mr Carter, you certainly did come to know and understand the risks of smoking, correct?
A Yes, I did.
Q You continued smoking anyway?
A That is correct.
Q Now, we talked a little bit about the x-ray that you had been given on February 4th, 1991
A I believe that's correct, yes, sir
Q And I guess you came home from that and you told Mrs Carter about that?
A Yes
Q Did you call your son or talk to your son Larry about that x-ray?
A I don't recall I could have.
Q Do you remember calling him the day of the x-ray? Did you have a discussion with him about it?
A I tell you, I could have All that is very, very cloudy
Q He would have been --
A Yes I don't know whether I called him or not I couldn't say
Q You would have sought out his advice,

Page 2366

didn't you?
A I did later on, but I don't know what time period I did that
Q Can you tell me whether it was before or after you had your bronchoscopy?
A I probably talked to him before that, yes
Q Shortly after the x-ray? Within a day or two?
A I don't recall
Q Can you be any more specific as to when you spoke with Larry in relationship -- between the x-ray and the bronchoscopy, can you give us any better idea?
A No, I can't
Q Did you see -- after you visited Dr Decker on February 4, when was the next time you actually saw Dr Decker or visited his office?
A Next time I saw Dr. Decker was when -- after the operation
Q Did you speak to Dr Decker at all between the time of the x-ray and the time of the operation?
A Not that I recall
Q Either in person or on the phone?
A Not that I recall.
Q Isn't it correct that you felt that

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2367

Dr. Decker is the person who diagnosed your lung cancer?
A No.
Q That's incorrect?
A Dr Decker didn't – did not diagnose my lung cancer.
MR RILEY May I approach, Your Honor?
THE COURT Yes, sir
Q Mr Carter, you have a copy here I'm going to read to you from page 15, sir See page 15, line 25?
A Yes, I do
Q Question you were asked. Dr Decker diagnosed your lung cancer? And your response to that question was yes?
A Yes
MR MAXWELL Your Honor, I would request that lines 18 through 22 on page 20 be read under the completeness doctrine
THE COURT All right.
MR MAXWELL Would you like me to read it?
THE COURT Yes, sir
MR RILEY Your Honor, can we read the whole question and answer, because that's only part

Page 2368

of the question I'd like to read the whole answer if we're going to read that portion of the testimony
THE COURT Which answer are you referring to, Mr Riley?
MR RILEY Well, I think Mr Maxwell was referring to part of an answer on page 20
THE COURT Beginning on line 18?
MR MAXWELL It starts on 18, Your Honor
THE COURT And what is it that you request, Mr Riley?
MR RILEY Your Honor, if we're going to read those lines, I believe we ought to read the entire question and the entire answer which begins on page 19
MR MAXWELL I don't mind reading it, Your Honor
THE COURT Page 19, line 19?
MR. RILEY Yes, Your Honor
THE COURT All right
BY MR RILEY
Q Mr. Carter, we're going to turn to page 19 Are you with us?
A Yes.
Q Okay. And on line 19, you were asked this

Page 2369

question When you did this research where you went and you told me you read a fair amount about cancer after your diagnosis, where did you do that? And your answer was At home I have a medical book Well, let me start back and tell you why I thought throughout the last ten years before I quit smoking, I think, you know, I had read several articles in the newspapers I'd think you'd see in the Reader's Digest would give you certain symptoms of lung cancer
In January, the last of January 1991, I started spitting up blood, night sweats, and lost weight So we have a medical book And I pulled out spitting up blood. And the words were to the effect that once you did that, that it was normally too late
I had not had a physical since May 1989, so at that point I scheduled a physical with Dr Decker And Dr Decker did not have an x-ray machine And I told him I was spiting up blood He said there were several reasons for spitting up blood And I asked that we take an x-ray
He sent me someplace there at Memorial Hospital to have an x-ray After the x-ray, in my mind I already knew I had lung cancer Anyway, they

Page 2370

asked me to wait, and then the radiologist read the x-ray, gave it to me and told me to go back to Dr Decker's office
Dr Decker indicated there was a spot on the lung It could be either TB or cancer He wasn't sure, that further tests needed to be run -- would have to be run, and that I needed to see a pulmonary specialist He recommended and made an appointment with Dr Yergin
Is that your testimony, sir?
A That's my testimony
Q Mr Carter, you have had a collapsed lung at one point in your life?
A 1958
Q And you've had a couple of bouts with pleurisy in additional to that?
A Well, one pleurisy was diagnosed by a doctor at the same time The other one was my own self-diagnosis.
Q And that was later on sometime in the '70s?
A It was probably about '72 I did not see a doctor for that.
Q You told us yesterday that you had tried to quit smoking at one point because the -- you were

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2371

working with paper strips while you were a controller?
A That was in the early part of the '60s, yes
Q Let me ask you this. As I understand it, you worked at Imeson for a while?
A Yes
Q And then you went to Hilliard in '61?
A They closed that center and reopened a new building.
Q Was that in 1961?
A Thereabouts
Q And when they reopened the building, was that when they were using the radar or were they still using the paper strips?
A As I recall -- it's been a long time ago We were in the process of getting radar, and I'm not sure what we had We went there, I was not radar-certified, I'll put that it way
Q Well, I'm just trying to fix the date according to the date when you tried to quit according to when radar came in Can you tell us?
A I think when I tried to quit was before we moved from Imeson Airport because that place, at that time we did not have radar

Page 2372

Q So it was before '61?
A No, it was in '61 We moved in '61, okay?
Q Yes, sir
A All right
Q And you tried to quit before that?
A You know, that's going back a long time It was sometime before we got into radar that I was trying to -- that my first attempt to stop smoking
Q You mentioned to us yesterday that Dr Rood had told you to quit smoking?
A I don't recall telling you that Dr Rood told me to quit smoking.
Q Well, you had the problem with the heart, right?
A At that point, yes
Q And he had given you some Phenobarbital?
A I believe that's what it was
Q Was that while you were actually working as a controller?
A Yes
Q And I believe you were a controller during the time period 1956 to '67?
A Yes
Q So that would fix for us the time period when Dr Rood -- when you had that discussion with

Page 2373

Dr. Rood, correct?
A Yes.
Q It would be in that time frame, '56 to '67?
A No, it could have been up to '69. When you -- if I was -- remember this, if you were doing administrative work or got promoted, you still had to stay current on the board. So there was about eight hours a week that you had to go and control airplanes to stay current
Q Can you give us any more -- be any more specific as to when you had this discussion with Dr Rood?
A No, I can't.
Q You've told us you're still using the Nicorette gum Do you crave that gum?
A Yes, I use the gum I'm still addicted to nicotine
Q You crave the gum though?
A Can I answer, please?
Q Yes, sir
A Thank you. Yes, I'm still addicted to nicotine I got addicted by Lucky Strike cigarettes in 1947 And I'm still addicted to this day I'm afraid if I get off of it for any time that I don't

Page 2374

want to go back to smoking And so I use the nicotine because I am addicted to nicotine, Mr Riley
Q Mr Carter, I'm sorry My question is simply Do you use the gum because you crave it?
A Because I'm addicted
Q Do you crave the gum?
A I'm addicted
MR MAXWELL Objection, Your Honor Asked and answered.
THE COURT Overruled.
Q Mr Carter, do you use the gum because you crave it?
A I'm addicted.
Q Mr Carter, please turn to page 131 of your deposition I'm going to read you some questions I asked you and the answers you gave me in your deposition starting on line 18 I asked you -- we were talking about your use of the gum
MR MAXWELL Excuse me, what page?
MR RILEY It's page 131, line 18
Q I asked you: Do you use that as a reward? Your answer was: No, I use it because I crave it
And I asked you You crave the nicotine?

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2375

And your answer was: Yes.
Is that what you told me?
A Yes.
Q And you told us that you use three quarters of a two-milligram piece per day?
A Approximately
Q And that's all the nicotine that you desire; is that right?
A That's correct
Q Mr Carter, did you ever notice on the packages of Lucky Strike cigarettes that you used to smoke, did you ever notice the name of the manufacturer?
A Yes
Q *They were made by The American Tobacco* Company?
A That's correct
Q And that was back in the 1950s, '60s and early 1970s, right?
A Yes
Q They were made by America Tobacco, not by Brown and Williamson, correct.
MR MAXWELL Objection, Your Honor, relevancy
THE COURT Sustained

Page 2376

MR RILEY No further questions, Your Honor
THE COURT Any redirect, Mr Maxwell?
MR MAXWELL Yes, Your Honor
REDIRECT EXAMINATION
BY MR MAXWELL
Q Good morning, Mr Carter
A Good morning
Q Yesterday you were asked some questions about motivation Do you recall that?
A Yes, sir
Q And towards the end of the day you were asked a question about whether you had never really been motivated before 1991 Do you recall that question?
A Yes, I think it was asked.
Q Did you mean to say that you were never motivated to quit smoking before 1991?
A *No, sir, I was motivated several times* Many, many times
Q Well, let's talk about that. I'd like to turn your attention to the time that you tried to quit smoking back in '83 and '84 when you went through the nicotine withdrawal clinic.
A Yes, sir

Page 2377

Q Were you motivated to quit smoking at that *time?*
A I certainly was
Q Why did you want to quit smoking?
A Because it was bad for my health and also for my wife
Q It was causing problems in your relationship?
A Yes, but I wanted to quit smoking
Q And in fact on that occasion you did stop smoking, is that correct?
A That's correct
Q For several days? A week?
A Approximately a week, yes, sir
Q *All right. And how did you feel when you* stopped smoking?
A I was miserable I was lethargic I was nervous I was irritable I couldn't function It was a very, very miserable time
Q Did you feel sick?
A Yes, sir
Q Now, when you went back to work on Monday, did you feel the same way?
A Yes, sir, there was no change
Q And you hadn't smoked a cigarette yet,

Page 2378

right?
A No, sir
Q And when you got to work, did you feel like you could function?
A No, sir I think I testified yesterday that I turned over the duties to my deputy and told him to take care of any business, that I wasn't feeling well
Q You didn't think you could handle it?
A No, sir I was afraid I couldn't function
Q And there were questions about the phone calls, that you told your secretary to hold your calls?
A Yes, I did.
Q Now, did that apply to everyone or just the call from the nicotine withdrawal clinic?
A That was everyone
Q *Why was that?*
A I just didn't want to talk to anyone. I didn't want to make any decisions I just didn't want to talk to anybody
Q Now, during this period of time that you hadn't been smoking, did you experience any craving sensations?

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Document from the Industry Documents Library at industrydocuments.ucsf.edu/docs/nzxl0001

Page 2379

A Yes, I craved nicotine
Q And you told us about being nervous and depressed. When you woke up in the morning and you got out of bed, did you experience anything?
A I sit on the side of the bed and I shook
Q Now, later that morning of the day that you went back to work, you told us that you went into the cafeteria and the manager handed you some cigarettes?
A That was at lunchtime, yes, sir
Q And Mr Riley, I think, suggested that at that point you just changed your mind? Do you recall that testimony?
A Yes, sir
Q Now, I want to ask you a few questions about that You put those cigarettes in your pocket?
A I did
Q And you walked outside?
A Yes
Q You walked around the compound?
A I did
Q How were you feeling?
A I was feeling the same way I was restless, lethargic I was just plain sick

Page 2380

Q And as you walked along did you know that if you lit that cigarette and smoked it that you would feel immensely better?
A Yes, sir
Q And you did that?
A I did that
Q And when you sucked that smoke into your lungs, what happened?
A I immediately started feeling better
Q Did the whole world improve?
A Yes, sir Like walking out of a dark cloud into a bright room
Q Did you go back into your office?
A Yes, sir
Q Were you able to do your job?
A Yes, sir.
Q Was this just after one cigarette or did it take several cigarettes to get to the point where you felt well again?
A I don't recall I remember walking around the building, smoked probably two or three before I came back to my office
Q So the symptoms that you've told us about, did they disappear after you started smoking again?
A Yes, sir.

Page 2381

Q Now, you heard Dr Feingold's testimony about nicotine addiction?
A Yes
Q And you heard him describe the symptoms relating to nicotine withdrawal?
A Yes
Q And you also heard Dr Feingold talk about relapse?
A Yes
Q When people who stop smoking go back to smoking?
A That's right
Q Now, at the time back in '83 and '84 when you were experiencing this, did you understand the medical concepts of addiction?
A No, sir
Q Do you now understand what you were experiencing back in '83?
A From Dr Feingold I understand perfectly
Q Is it your understanding that the symptoms that you were experiencing were withdrawal symptoms?
A Yes
Q And that you actually, when you started smoking, what happened?
A They went away

Page 2382

Q Was that a relapse?
A Yes, it was
Q So when Mr Riley suggested you just changed your mind, that's really sort of a gross oversimplification, isn't it?
A Yes, it is
Q Now, what about the other times in your life that you tried to quit smoking? Were you motivated when you tried to quit smoking?
A I was motivated each time I put those cigarettes down.
Q And each time you put the cigarettes down, what happened to you?
A I would get, again, lethargic I'd get sick I would be nervous I couldn't think straight, be light-headed.
Q Was it a cycle you went through?
A It was basically the same time that I'd quit smoking, about the time I'd want a cigarette, it was that craving, the restlessness, the nervousness. It was just a bad, bad feeling.
Q And, you know, you mentioned from the stand in response to the questions about the gum that you believed you were addicted and that's why you chewed it?

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Document hosted at industrydocuments.ucsf.edu/docs/nzxl0001

Page 2383

A Yes
Q Now, when you say addicted, is that something you've come to understand since this lawsuit began?
A Yes, I do
Q You didn't understand during the '50s or '60s and '70s that you were addicted, did you?
A No
Q And you also heard Dr Feingold talk about information being important to you in terms of being able to break a cigarette addiction?
A Yes
Q Is information -- the kind of information that you would like to have had, was that denied you by American Tobacco Company?
A Yes, it was
Q Let's talk about 1953 You heard testimony about the mouse-painting experiment in 1953.
A Yes, sir
Q And the fact the tumors on these mice were generated by tar from Lucky Strike cigarettes?
A That was the testimony, yes, sir
Q Is that something you would have liked to have known from American Tobacco in 1953?

Page 2384

A Yes, I would
Q Do you think it might have made a difference to you?
A It could have
MR RILEY Objection, Your Honor, speculation
THE COURT Overruled
Q And in fact there's a lot of information that's come out in this trial that you were never provided, isn't that true?
A That is correct
Q You heard the testimony about the secret documents?
A Yes, sir
Q You now know that Brown and Williamson Tobacco company concluded by their own research that nicotine was addictive in 1963?
A That is correct.
MR. RILEY Objection, Your Honor No foundation
THE COURT Overruled.
Q Would you have liked to have known that in 1963?
A Boy, I sure would have
Q Are you mad about that?

Page 2385

A Yes, I am.
Q Now, you were asked if you crave the nicotine gum.
A Yes.
Q Just tell the jury, please, what happens -- what would happen if you stopped chewing the nicotine gum for any length of time
A I'd like to sit here and say I wouldn't go back to cigarettes, knowing what I know now, but I know that I'm addicted And I use this to satisfy my addiction to nicotine
Q Well, if you stopped chewing the gum, would you or have you -- have you in the past stopped chewing the gum and then experienced symptoms?
A Similar symptoms, yes, sir
Q And those are the symptoms that you've already told us about?
A Yes, sir
Q And have you seen the package insert on Nicorette gum?
A Yes
Q You understand that Nicorette gum of course contains nicotine?
A Yes

Page 2386

Q And do you understand that that product was prescribed for you to treat nicotine addiction?
A That's correct
Q Let me change gears here Do you remember that Mr Riley asked you a lot of questions about the 1964 U S Surgeon General's report?
A Yes
Q Asked you a lot of questions about whether you had seen it or heard it or read it in 1964?
A Yes
Q Well, did anyone from American Tobacco Company ever advise you as to what the conclusions of the Surgeon General were in 1964?
A No, they did not.
Q Didn't send you any fliers?
A No, sir
Q No package inserts?
A No
Q Nothing on their advertising?
A No.
Q And you also heard Mr Riley ask you about tar and nicotine figures?
A Yes
Q During the 25-year period that you smoked Lucky Strike cigarettes, did you ever at any time

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2387

see any tar or nicotine figures on the pack of Lucky Strike cigarettes?
A No
Q But you saw it in the newspapers?
A Yes
Q Do you feel that you had a right to hear it from American Tobacco?
MR RILEY Your Honor, I object to this Can we be heard?
THE COURT Yes, sir
(Side-bar conference held outside the hearing of the jury)
MR RILEY Your Honor, there was a long period of time in 1963 when the FTC would not allow material to be put on the packages They took the position that this was not a proper thing to do I think Mr Maxwell's questions are trying to suggest otherwise
MR WILNER They opened the door
MR MAXWELL I think they opened the door, Your Honor And, frankly, there were a great many years when they could have done exactly that, and they didn't do it They did it for their other products but didn't do it for Lucky Strikes
THE COURT Objection is overruled

Page 2388

MR MAXWELL Thank you
(Side-bar conference concluded, proceedings resumed before the jury)
Q Mr Carter, I believe the last question that I asked you was that you never heard from American Tobacco Company with respect to tar and nicotine figures for Lucky Strikes, did you?
A I did not
Q Now, you were also asked a lot of questions about cholesterol
A Yes
Q I want you to tell the jury what do you fear more, a recurrence of your lung cancer or your cholesterol level?
A I worry about lung cancer every day, Mr Maxwell
Q Have you ever known anyone, Mr Carter, who got lung cancer from eating cookies?
A No, sir
Q But you had friends die from lung cancer related to smoking, haven't you?
MR RILEY Objection, Your Honor. There's no foundation for that.
MR MAXWELL Goes to his mental pain and anguish, Your Honor

Page 2389

THE COURT Overruled.
Q You have had personal friends, close personal friends, who have died from lung cancer; have you not?
A There's a funeral today for one, sir
Q Are these individuals that you worked with?
A Yes, sir
Q At the center?
A Yes, sir
Q These were cigarette smokers?
A Yes, sir
Q Does that give you some concern about your future?
A Every day, yes, sir
Q Mr Riley asked you a number of questions about warnings and about what you had heard And I believe you said that you had heard that one out of three smokers could get lung cancer at one time Do you recall that testimony?
A Yes
Q But when you heard that, did you believe it?
A From Mr Riley?
Q No, I mean when you heard back whenever,

Page 2390

'60s or '70s, that one out of three smokers could get cancer, did you believe that?
A Well, there was testimony on the other side from the tobacco company that that was false, it wasn't correct information That data was flawed or something, or something to that.
Q If you had heard it from American Tobacco Company, would it have made a difference to you?
MR RILEY Your Honor, calls for speculation And it also is subject to the preemption defense, Your Honor
MR MAXWELL I think they've opened the door, Your Honor, but I can rephrase the question
THE COURT All right, why don't you rephrase it.
Q Mr Carter, if before July 1, 1969, American Tobacco Company had told you that one out of three cigarette smokers could get lung cancer, would that have impressed you?
A Yes, it would have
MR RILEY Your Honor, I object to that on the grounds of speculation
THE COURT Overruled
Q But you never did hear it from them, did you?

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2391

A I just heard the opposite, that it wasn't bad for you, didn't cause lung cancer. And I think in this courtroom we've already heard that smoking doesn't cause lung cancer from the attorneys for the tobacco company And I get confused hearing their testimony and the fact that it doesn't cause lung cancer, but the lung cancer I had wasn't caused from smoking because the other -- it doesn't fit the lung cancer that was caused by smoking. So it's very confusing even this information to this day

Q Talking again about information, Mr Carter, let me just show you some statistics which had previously been put up here. Let me refer your attention to down towards the bottom there, cancer of the lung -- at the very bottom Cancer of the lung, 2236 percent increased risk of a smoker over a nonsmoker If that information had been provided to you by American Tobacco Company, would it have made a difference to you?

MR RILEY Object, Your Honor, calls for speculation

THE COURT Overruled

A Yes, sir

Q Look at the figure for chronic obstructive pulmonary disease, chronic bronchitis and emphysema,

Page 2392

965 percent increase If that information had been provided to you, would it have made a difference to you?

MR RILEY Same objection, Your Honor

THE COURT Same ruling

Q Would it have also perhaps helped you with your motivation?

A Certainly

Q Now, Mr Carter, as a child, did you understand the significance of a skull and crossbones?

A Yes, sir.

Q And as a child, sir, what did you understand about the significance of a skull and crossbones?

MR RILEY Your Honor, can we be heard at side bar?

THE COURT Yes, sir

(Side-bar conference held outside the hearing of the jury)

MR RILEY Your Honor, this is inappropriate redirect. He's just rehashing his case It's got nothing to do with cross-examination He's just trying to recapitulate his case It's rehash and it's improper

Page 2393

MR MAXWELL Your Honor, he was asked -- the witness was asked numerous questions about what he knew and what information he had about the risk and the dangers and how he acted on that They have opened the door to this, and it's entirely proper It goes to his lack of warning

THE COURT I'm going to allow it. The objection is overruled

(Side-bar conference concluded, proceedings resumed before the jury)

Q As a child, what did you understand the significance of a skull and crossbones to mean?

A Death. Danger

Q As a child when you started smoking, if some kind of a warning similar to this had been used, would it have made a difference to you?

MR RILEY Your Honor, object Calls for speculation

THE COURT Overruled

A You know, that's probably one of the earliest things I can remember We lived on a farm when I was a child. There was a can of something that was called lye that you made soap with, lye soap on the farm And I recall my mother talking about that, and that's the first time I can ever

Page 2394

remember seeing that was on a can of lye And it was impressed upon me as a youngster that that was dangerous, it could kill you It could eat holes in you All those sort of things

Q Now, let's move forward from when you started smoking In the 1950s if a warning similar to this had been used on cigarettes, say in 1955 when you were a young man, would that have impacted on you?

A Yes

MR MAXWELL Your Honor, may I have a continuing objection to these questions? To questions about whether it would have made a difference or whether it would have an impact?

THE COURT Yes, sir Objections overruled.

Q Would that kind of information have been useful for you in perhaps understanding what you were faced with?

A Yes, sir

Q Mr Riley asked you some questions about a collapsed lung

A Yes

Q That was in 1958?

A Yes, sir

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Guttenberg http://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2395

Q Which lung was that?
A The right lung
Q Your cancer was in your?
A Left lung
Q One final question, Mr Carter When you smoked Lucky Strike cigarettes, did you smoke them exactly as American Tobacco Company intended?
A Yes, sir
MR MAXWELL Thank you, Mr Carter
MR RILEY Your Honor, may I be permitted recross?
THE COURT Let me see counsel at side bar, please
(Side-bar conference held outside the hearing of the jury)
THE COURT Tell me where you intend to go, Mr Riley
MR RILEY Your Honor, the witness has testified when he would try to quit smoking he felt sick I would like to discuss with him whether he ever visited a doctor on those occasions He -- let me just finish speaking He testified that he didn't know smoking was addictive, and yet in 1972 he told his son Robert that in fact he felt he was addicted I would like to --

Page 2396

MR MAXWELL He said he was hooked
MR RILEY He said he was addicted I would like to ask the witness what it is that led him to believe in 1972 that he was addicted I would like to explore with him, he said that when he stopped chewing the gum he felt that he had symptoms And I would like to explore that with him as well
MR MAXWELL Your Honor, we object to any further cross I deliberately and intentionally planned my redirect to stay within the bounds of the areas covered by Mr Riley He's had, I think, three and a half hours of cross-examination, and he has explored all of these areas that he wants to now explore again
THE COURT Mr. Riley, I agree All of those subjects were previously the subject of direct examination, and you had an opportunity to cross-examine him during your initial cross I'm not going to allow recross. Call your next witness, Mr. Maxwell
MR. MAXWELL Yes, Your Honor
(Side-bar conference concluded, proceedings resumed before the jury)
THE COURT Mr Carter, you can step down.

Page 2397

MR. MAXWELL May we have one moment, Your Honor?
THE COURT Yes, sir
MR MAXWELL Your Honor, the plaintiffs call Millie Carter
THE COURT All right. Ms Carter, if you would step up to the clerk to be placed under oath, please
THE CLERK Place your left hand on the Bible and raise your right hand, please Do you solemnly swear that the evidence you give in this issue shall be the truth, the whole truth and nothing but the truth, so help you God?
THE WITNESS I do
THE COURT Good morning, ma'am
THE WITNESS Good morning
THE COURT Mr Maxwell

MILDRED CARTER,

having been produced and first duly sworn as a witness, testified as follows

DIRECT EXAMINATION

BY MR MAXWELL
Q Good morning Mrs Carter
A Good morning
MR MAXWELL May it please the Court

Page 2398

THE COURT Yes, sir
A Ma'am, what is your name?
A Mildred Carter
Q And you are the wife of Grady Carter?
A Yes, I am
Q You've been here throughout this trial sitting at his side?
A Yes, I sure have
Q You heard all the testimony?
A Yes
Q Are you a little nervous?
A Very nervous
Q Mrs Carter, has your marriage to Grady been a happy one?
A Yes, it has been
Q You've heard testimony that Grady's smoking was a problem in your marriage?
A Yes
Q Is that true?
A It sure has been
Q And at the time that you met Grady, were you a nonsmoker?
A Yes
Q And, of course, you're a nonsmoker now?
A Yes

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2399

Q Had you ever smoked cigarettes prior to meeting Grady?
A Yes, I had.
Q What years of your life did you smoke?
A About the time between I was 18 and 21.
Q And how would you categorize your smoking?
A I believe I've heard someone say in this courtroom that, something about OPs
Q Other person's?
A Other person's
Q Well, did you actually ever buy any cigarettes yourself?
A No, I did not.
Q Did you actually ever inhale cigarettes?
A I tried to inhale one time, and I got real sick I started coughing and I couldn't stop, so I just didn't inhale anymore But I did light them
Q And you did light them?
A I did.
Q Did you come to really dislike cigarettes?
A Yes, I sure did
Q What did you dislike about cigarettes?
A I hated the way that it made me cough And I would cough so much until my sides would get sore I hated the way they smelled, the way they

Page 2400

made your clothes stink and your hair stink and just everything else about them
Q Now, of course when you met Grady you knew he was a smoker?
A Yes
Q And did Grady make a promise to you about his smoking?
A He sure did
Q Did he try to keep his promise?
A Yes, he did
Q Now, you heard questions, a lot of testimony concerning motivation?
A Yes, sir.
Q And let me just ask you that based on your observations of Grady from when you were married in 1983 and the times that he tried to quit, was Grady motivated to quit smoking?
A I certainly think that somebody is motivated if they buy cigarettes and then they take them and throw them in the trash can along with the cigarette lighter and the ashtrays, and they say they're really going to try to never pick them up again. So I would certainly think that's motivation
Q Did you believe that he was sincere?

Page 2401

A Yes, I certainly did.
Q And on some occasions, in fact, was Grady able to stop smoking?
A Yes, he was
Q And what would happen to Grady when he stopped smoking?
A He would get very miserable He acted like he lost his best friend. I felt that I was his best friend, so I thought that -- felt that he was -- didn't want anything to do with me and he was angry about giving up the addiction, the nicotine He was light-headed I've seen him sit on the side of the bed in the morning reading the newspapers, and he would be just shaking and trembling
He would lay in the chaise lounge and not open his eyes I knew that he wasn't asleep, but he would just lay there. And I could walk over and start to say something to him He would look at me and sometimes he would answer me and sometimes he wouldn't But I knew that he just didn't want anything to do with anybody I would say something like, Well, would you like me to invite the children over for dinner? And he said, I just don't want to see anybody right now I'm just too miserable
Q Now, you heard Dr Feingold testify as to

Page 2402

the differing symptoms that an individual can experience upon cessation of smoking?
A Yes
Q Did you observe some of those same symptoms in Grady when he stopped smoking?
A I felt that most everything that I heard was what I saw in Grady whenever he would try to quit
Q Now, do you remember giving a deposition in this case last year?
A Yes, I do.
Q And Mr. Prichard asked you a number of questions about the lawsuit?
A Yes, sir
Q And do you remember testifying that at one time in your life you thought you were addicted to chewing gum?
A Yes.
Q And do you remember also testifying at that same deposition that you thought someone could be addicted to chocolate?
A Yes
Q Well, now, last year when that deposition was given, did you have any understanding of the medical concepts or definition of addiction?

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2403

A No, I didn't.
MR. PRICHARD Your Honor, I don't have a strenuous objection, but I think Mr Maxwell is testifying by leading question
THE COURT Leading?
MR. PRICHARD Yes
THE COURT Sustained
Q What was your understanding, if any, about addiction when you gave your deposition?
A I really didn't have an understanding at all much except that I knew that it was a habit-forming thing So I really didn't know as far as other things, such as the chewing gum and the chocolate that I spoke about I now since have learned that certainly those things are not addictive and they do not cause lung cancer
Q All right As a result of listening to Dr Feingold, do you have -- do you feel you have a better understanding about the concept?
A I certainly do
Q Now, during those years when Grady would smoke and stop and smoke and stop, did you become angry with him because of his inability to stop smoking?
A *I was angry many times*

Page 2404

Q Did you blame him for his smoking?
A I certainly did I blamed him I thought that he didn't want to quit I didn't realize at the time how addicted he was to the cigarettes and to the nicotine
Q Do you blame him now?
A No, I don't
Q Let me move to January of 1991 Did Grady tell you that he had an appointment with Dr Decker?
A Yes, he did
Q And did you go with him on that appointment?
A I didn't go with him to that appointment because I had the flu, and I was very sick at the time I was -- I also might add that we thought it was just a routine examination, and so I didn't go
Q All right. After the appointment that your husband had with Dr Decker, did you go with Grady when he saw Dr Yergin?
A Yes, I did
Q And after that visit, did you later go *with Grady when he had a bronchoscopy?*
A Yes, I sure did.
Q Were you there at the hospital when he had the procedure where they put the scope down into his

Page 2405

lung and retrieved part of his tissue?
A I wasn't there during -- I was at the hospital I wasn't in the room at that time, but when they first took him in -- and I think we've heard testimony to the fact that they put the long Q-tip in his nose I was in the room beside him at that time
Q And did you after that, after that bronchoscopy, did you and Grady later return for a conference with Dr Yergin?
A Yes, we did
Q And do you recall the date that you had the conference with Dr Yergin?
A Yes, I do It was on Valentine's Day
Q What did Dr. Yergin tell you?
A He walked into the room, and I said, this is Valentine's Day It's sweetheart's day Please don't give us any bad news
Q What did he say?
A He told us that he had lung cancer
Q What was Grady's reaction?
A He was scared to death And -- well, I don't want to say scared to death He didn't die But that's the way that we felt, because both of us, *we had had so many friends who had had lung cancer*

Page 2406

and the prognosis was not good And so many of them have died since, and so we just felt that that's what we were being handed was a death sentence
Q Did you discuss with Dr Yergin surgery?
A Yes, we did
Q And what concerns did you and Grady have about the surgery?
A Well, when we talked about it there We talked about the surgery and what they would do Later on when we were alone together and had a lot more time to think about it, I just felt that when the surgery occurred that I may never see my husband again And that's very painful I don't know if I could really describe the pain, but if you love someone very much you don't want to know that they could die.
Q The surgery was scheduled?
A Yes
Q And was the surgery --
A Three days before my birthday
Q Was that an ordeal for you?
A *It certainly was.*
Q After the -- well, during the time that Grady was at the hospital, before the surgery, did you stay there at the hospital with him?

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2407

A I certainly did. I only went home every other night just to take a shower and to wash my clothes -- to change my clothes and do the few things I had to do there I didn't even sleep there I would just go home for two or three hours and then I'd go back to the hospital again And the next day I would just sponge off in the little bathroom they had close to his room. So I only went home every other night

Q How many days was Grady in the hospital?

A Eleven days

Q After Grady's surgery did you have occasion to see him immediately after the surgery?

A Not immediately after I saw him probably -- the surgery started somewhere around 8 00 in the morning, and I probably saw him somewhere about three or 4 00 in the afternoon

Q And was he conscious when you saw him?

A He was conscious He was very sedated, but I could talk to him and he would answer me There were times when I wasn't sure he really knew what he was talking about, but he was off and on

Q And did you observe through his recovery that he experienced any particular pains or other symptoms?

Page 2408

A He had excruciating pain for a very long time

Q Did that eventually resolve itself?

A It has resolved itself somewhat, but even to this day he still does have some pain in the incision It's not an everyday occurrence, but there are times when he does still have pain

Q You've heard testimony about recurrence of lung cancer?

A Yes, I have

Q Do you fear that for Grady?

A I will fear it for the rest of my life because I have always heard -- and I've heard some people in this courtroom say cure -- but have always heard that there's no cure for cancer; it's only in remission.

Q Does Grady fear that?

A Yes, he does

Q Did you hear Dr Feingold's testimony that Grady now has a reduced life expectancy?

A Yes.

Q Are you concerned about that?

A Yes, I am. Very concerned about it. If you're telling me that -- somebody tells me they take one day away from the time that I have with my

Page 2409

husband, it really makes me mad. It makes me just infuriated to think that I could lose him.

Q You heard the testimony in this trial about several matters. Do you recall seeing the Heimann videotape deposition?

A Yes, sir, I do.

Q I want to show you some quotes

MR PRICHARD Can I see it, please?

MR MAXWELL Some quotes from the Heimann videotape deposition that was played

A Okay

MR. PRICHARD Your Honor, may we approach for a moment?

THE COURT Yes, sir

(Side-bar conference held outside the hearing of the jury)

MR PRICHARD Your Honor, I'm not sure where he's going with this, but I suspect that one of the things he would like to have this lady comment on is the credibility or believability of Mr Heimann's statements, which as counsel is well aware is highly improper

Number two, I think whether she is mad or not about what Mr Heimann said back in 1986 really has no bearing on this lawsuit, it doesn't bear on

Page 2410

the issues of libel or damages And her anger and her whatever, her resentment or whatever it might be that he's trying to conjure up is irrelevant to the issues in this case I'm not sure where else we're going with it, but that much I can see coming

MR MAXWELL Her anger doesn't have to be conjured up Believe me, it's very real, and it's part of her damages And I'm not going to ask her to comment on the credibility of it. I'm just going to ask her how does that make her feel. She's mad about it

MR PRICHARD How she feels about a statement made by Mr Heimann in 1986, that still does not bear on the issues in this lawsuit.

MR MAXWELL It was the position of American Tobacco Company in 1986 that their product was not injurious to health. And in light of the testimony that's been adduced in this trial, that is outrageous

THE COURT I'm going to allow it. I don't expect that she'll be able to answer or give testimony about Mr Heimann's believability --

MR MAXWELL I understand.

THE COURT -- the effects of the statement on the defendant I think it's relevant

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2411

MR. PRICHARD Your Honor, there's also one additional matter There's certainly been no foundation that Mrs Carter ever heard, saw or knew anything about that statement until we get in court here today So this is just comment on what other people said and other people have done in this courtroom, and that kind of evidence is improper

MR MAXWELL She is angry about the position that American has taken in this case

THE COURT I'm going to allow her to testify The objection is overruled

(Side-bar conference concluded, proceedings resumed before the jury)

BY MR MAXWELL

Q Mrs Carter, I want to show you some quotes from the deposition of Robert K. Heimann that you heard on the videotape deposition which was played last week

A Yes, sir

Q To the effect that we believe our product is not injurious to health and that the Surgeon General is dead wrong Do you remember that testimony?

A Yes, sir, I do

Q How did that make you feel when you heard

Page 2412

that?

MR PRICHARD Your Honor, irrelevant

THE COURT Overruled

A It really makes me very infuriated to think that the tobacco company, American Tobacco Company, Brown and Williamson, can make a statement like that It's just a lie

MR PRICHARD Your Honor, again, consistent with your ruling, I hate to interrupt the witness, but I move to strike the testimony and ask that counsel be admonished to control the witness from making improper comments

THE COURT Objection sustained Motion granted

Q Mrs Carter, don't comment on the credibility of the statement

How did that impact on you?

A Just really made me mad, infuriated

Q Where did you and Grady go last night?

A We left here and went to a funeral home in Arlington, one of Grady's good friends that he had worked with over the years -- we found out yesterday morning by reading the paper -- had died from lung cancer And they're burying him today at 2 00

Q This is one of Grady's friends from work?

Page 2413

A Grady's friends from work.

Q Was he a cigarette smoker?

A He had been He had quit in 1984

Q Does that cause you concern for Grady's future?

A Yes, it certainly does Since Grady's lung cancer occurred, we have gone to quite a few funerals of his friends and some of mine that died from lung cancer Every time you go, something like that, whether it's the visitation or the funeral, you can put yourself in that place and you know that that could be your husband laying there

Q Mrs Carter, what are you seeking in this lawsuit?

A I'm seeking compensation for the loss of part of my husband's body, his lung, seeking compensation for the pain and suffering we've been through, what it's done to our marriage Our marriage is great now, but there were times when it was not because of cigarette smoking We had many, many bad times over it

MR MAXWELL Thank you, Mrs Carter

THE COURT You re looking at the clock, Mr Prichard?

MR PRICHARD I am

Page 2414

THE COURT Do you think we should take a break right now?

MR PRICHARD Yes, Your Honor, if it please the Court

THE COURT All right We'll be in recess until 10 15

(Jury out at 10 00 a m)

(Change of reporter)

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2415

Thursday, August 1, 1996 10.15 a.m.

- - -

(Jury absent)

THE BAILIFF All rise This court is again in session. Be seated, please

THE COURT Mr Prichard, are you ready to proceed?

MR. PRICHARD Yes, Your Honor

Mr Forte, bring the jury in, please.

THE BAILIFF Yes, sir

(Jury present at 10 16 a m)

THE COURT Please be seated.

Cross-examination, Mr Prichard

MR. PRICHARD Thank you, Your Honor

CROSS-EXAMINATION

BY MR PRICHARD

Q Good morning, Mrs Carter

A Good morning

Q If you would, like you've done before, keep your voice up so we can hear you

A I'll try

Q You mentioned one thing in response to something that Mr Maxwell said about Mr Heimann, the videotape of Mr Heimann Do you recall that?

A Yes, I do

Page 2416

Q And before you got involved in this lawsuit, I take it that you had never heard of Mr Heimann Is that true?

A I had heard of him

Q And did you know who he was?

A I couldn't tell you who he was before now

Q Certainly And until this lawsuit got going you had never heard or read any statements by Mr Heimann, had you, that you can recall?

A As I said, I had heard of him.

Q And, likewise, I take it that your husband, Mr Carter, to your knowledge, had never heard any statements attributed to Mr Heimann before this lawsuit got going. Is that true?

A I believe that he had, but I think you would have to ask him.

Q Well, I think he was asked and I think you probably heard him say he can't recall any statements from anyone from American Tobacco. Do you remember that?

It's not a big -- if you don't remember, that's fine

Now, certainly Mr. Carter has never told you as long as you've known him -- almost 13 years -- that he smoked or didn't smoke because of anything

Page 2417

that Mr. Heimann or anyone else with The American Tobacco Company said to him. Isn't that true?

A I don't recall him saying.

Q Now, a little bit on the background: You graduated from high school at DuPont in 1962?

A Yes.

Q And immediately entered the workforce?

A Yes

Q Okay.

A Well, actually let me go back, if you'd like me to I had entered the workforce before then. I worked my last two years in high school.

Q So you became a full-time employee after you finished school?

A Yes, I did.

Q Okay And you worked for various insurance companies, including Independent, Peninsular, Prudential over the years as a keypunch operator or something in that field, is that right?

A Yes, sir, I sure did.

Q And you worked for Independent, as I recall, from about 1972 to about 1983?

A Yes

Q And you were working for Independent at the time that you met Mr Carter?

Page 2418

A Yes, I was

Q And when you were still -- and shortly after you-all got married, and that was in early '83, January?

A January '83, yes

Q You had met Mr Carter in August of 1982?

A Yes

Q In 1983 sometime after you got married to Mr Carter then you quit working for Independent, correct?

A Yes, I did

Q And Mr. Carter had retired at that -- had not retired at that point. He was still working?

A He was still working.

Q Okay. And it was during the time that you were working at Independent that the annual event, the Great American Smoke-Out, came around?

A Yes.

Q Correct? Okay. And we'll get back to that in a little bit. I just wanted to make sure I had that time frame set.

The folks that introduced you to Mr. Carter were Ed and Joyce Hayes; is that correct?

A That's correct.

Q And Mr. Hayes, of course, had been a

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Guttman http://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2419

long-time business associate and friend of Mr. Carter before you ever met him?
A That's what I heard.
Q And his wife, Joyce, you knew?
A Yes.
Q And she's actually the one that kind of set up the date Is that a fair statement?
A Pretty much, yes, she and Ed
Q And you knew -- strike that Mrs Hayes knew that you didn't really care too much for dating folks who smoked, true?
A I really had not known Joyce a very long time, but I'm sure that I had made mention to her that I didn't like smoking
Q And, in fact, you didn't really like to date smokers because that meant you would be around people who smoked?
A That's correct
Q But in any event, you went on the date and you liked Mr. Carter, and the only thing you really didn't care for too much was his smoking?
A That's correct
Q And you made that very clear to her, Joyce, and then to Mr. Carter probably by the second date?

Page 2420

A That's correct
Q And actually your version or your -- I hate to use an improper word -- but your dislike of smoking stems from several reasons And one is that you feel like you're allergic to smoke itself, correct?
A Yes
Q And that's something that you had noticed that smoke bothers you when you were around it even in high school before you ever smoked?
A I wasn't around it in high school.
Q And when you started working full time after high school, you were around people back then who could smoke on the job, correct?
A Not right after high school, but shortly thereafter, yes.
Q In any event, pretty soon you were working side by side with people who smoked and you noticed at that point that it made you cough and you didn't want it?
A That's correct.
Q Okay. And you had --
A But let me say I did not know at the time that it was addictive.
Q I understand your views on that

Page 2421

A Okay.
Q If I ask you about that I'm sure that you can answer it in full.
A Okay.
Q But in any event, that was before you had ever tried to smoke a cigarette yourself, correct?
A Before I had ever tried to smoke one myself?
Q Yes, ma'am.
A No
Q Maybe I'm confused. It's not that big a deal. But at some point in time, as you've testified, you tried a little smoking yourself You'd bum other people's and maybe puff on it, not even maybe inhale, correct?
A That's correct.
Q But based on what you had seen about smoking and smokers and based on your experience just trying and lighting a cigarette, you decided that you did not want to become a regular smoker, didn't you?
A And I did not want to
Q And you also decided that because it made you cough and made your hair stink, that that wasn't something that you wanted to do?

Page 2422

A No, I didn't want to do it
Q And you also decided that you did not want to become a regular smoker because you did not want to become addicted to smoking cigarettes, isn't that right?
A That wasn't, I don't think, a concern at that time I didn't realize that cigarettes were really that addictive at that time
Q But one of the reasons --
A But the real reason -- can I finish?
Q I'm sorry
A The real reason that I really did not want to become a smoker was because it made me cough, and whenever I coughed it made my sides hurt. It was as if you had been coughing from the flu or something So that was a concern I certainly didn't like the way it made my hair smell and my clothes smell and anything else smell They just stink.
Q I understand. But at that time you knew -- and this was in the early to mid-sixties, in that time frame, correct?
A I would say somewhere about maybe '63, '64
Q I guess that's right before the mid-sixties?

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2423

A Close, that's right.
Q And at that time you knew that you didn't want to become a regular smoker because you were afraid you might get addicted, whatever addicted meant to you at that time, true?
A I just didn't like smoking because of the way it made me feel.
Q Well, let me --
A I didn't know at that time that they were that addictive I have since learned that they are though
Q Okay. Do you remember when we took your deposition, you and I? We sat down, and your attorney was there and I was there and the court reporter was there?
A I sure do.
Q And we sat down and I asked you a number of questions?
A That's correct.
Q I'm going to give you one of the questions that I asked you and see if you remember the question and remember the answer, okay?
MR PRICHARD Counsel, on page 79
Q I just want to see if this helps refresh your recollection as to what you told me back in

Page 2424

October of last year, okay?
A Okay
Q We'll start, for completeness sake I hope, at page 78, line 16
Question. Can you tell me why you stopped being a social smoker?
Answer Yes
Question Would you?
Answer Yes
Question Will you?
A I remember that I sure do
Q Answer Yes
Do you remember that line of questions?
A I sure do
Q See if you remember this one.
Well, then tell me.
Answer: Well, as I still contend today, they make your breath stink, your clothes, your hair, your body, whatever else, can cause you to cough. So I didn't want any of all that, and certainly I didn't want to become addicted to them, so I just decided that I didn't want it in my life.
Do you remember that answer?
A I sure do.
Q Then I went on to ask you at line five:

Page 2425

Sure. So back there in the middle-sixties when you did this social smoking you knew that it could make your breath smell bad?
And you said -- answered right.
Question And makes your clothes stink?
Answer Right.
Question It gives you a smoker's cough?
Answer Right.
Question Also they were habit-forming?
Answer I didn't know that at that time
Question I thought you told me that you quit being a social smoker because you didn't want to become addicted?
Answer I did tell you that, but I didn't know that I just didn't want to become addicted.
MR MAXWELL Objection, Your Honor This is improper impeachment. It's consistent with her testimony she's just given.
THE COURT Are you done?
MR PRICHARD I've got one more question and answer, Your Honor
Q Question, line 19, page 79 How did you know that becoming addicted was something that you didn't want to happen to you with cigarettes back when you quit?

Page 2426

Answer Well, I really don't want to become addicted to anything There was one time in my life when I chewed gum, up to nine packs a day, and I was addicted to that But I didn't want to be addicted to that either so, you know, it was just something I didn't want to do
Do you remember that?
MR MAXWELL The same objection
A I sure do
Q So whatever your belief and the definition of addiction today may be, back in the early sixties, before 1965, you didn't want to smoke regularly, for among other reasons, because you didn't want to become addicted. Isn't that true?
A I didn't understand addiction then as I understand it now.
Q Sure But however you understood it back then, you knew that you didn't want to be that, whatever it was, right? Whatever addiction meant to you, you didn't want to do that?
A I didn't want to do it.
Q Okay.
A Because it made me cough, because it made my clothes stink and my hair stink and whatever else. I just didn't want to do it.

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2427

Q That's fine. And I think Mr. Maxwell asked you a few other things that you could consider yourself, quote, addicted to, and we talked about gum and chocolate and things like that, distinguishing them from other things But also you said you were addicted to Grady Isn't that true?
A Yes, I am addicted to Grady
Q And you love Grady very much, don't you?
A I sure do
Q Okay. Now, before --
A But I don't believe it's the same thing
Q Yes, ma'am, I understand.
Now, before you got married you-all started -- you started talking about getting married back in the fall of 1982, correct?
A Somewhere in there.
Q And before you did marry your husband you did discuss smoking with him, didn't you, with Mr Carter?
A I told him that I didn't like the fact that he smoked and he promised me that he would try to quit
Q Right, and --
A If we discussed it at length, no, we didn't

Page 2428

Q But he did promise you that he would at some point if you-all got married he would quit?
A He would try to quit
Q And, in fact, at that point he said that he thought he could quit, didn't he?
A He said that he had tried it before and was not successful, but that he would try again
Q Yes, ma'am, he said he would try again and also he said to you that not only would he try to quit but that he thought that he could quit. Didn't he say that?
A I'm sure that he did at that time think that he could, but there were other times when he thought that he could but he was not successful because he was addicted.
Q Sure And he didn't use that term addicted when he talked to you before you got married?
A To tell you the truth, sir, I don't recall right now whether he did or not. That's been, what, 13, 14 years ago.
Q Yes, ma'am, I understand. And we've talked at great length here today about things that happened even longer ago than that.
A That's correct

Page 2429

Q So bear with me, okay?
The point is, is that when your husband said that he would try to quit if you got married or when you got married, and he didn't say I can't quit; it's impossible for me to quit, did he?
A I don't recall whether he said that or not.
Q He gave you the impression from out of his own mouth that he thought he could quit?
A He thought he could quit and that he would try
Q And then -- I'm not sure how it happened, but he was involved in the hearings following the PATCO strike with the FAA?
A That's correct
Q And he was going to court every other day It seemed like all the time
A I don't recall how often, but he was going to court.
Q Right And that was really an additional burden on him and a real stress on him, wasn't it?
A Well, I'm sure that, just as this is stress, you know, that certainly was too.
Q Right, having to go to court every day can get to be pretty stressful

Page 2430

A Sure
Q Right And he used that fact of the hearing that he was going through as an excuse to put off attempting to quit as he had promised you he would do?
A Just as I've learned from this testimony, certainly through Dr Feingold, that that's what most smokers do They use excuses and reasons to not quit because they can't because they're addicted
Q Sure I'm not sure I asked you about Dr Feingold yet.
A Okay
Q But that is what he said He said let me get through the hearings, Mrs Carter, and then I'll quit smoking?
A Right. He said he would try
Q Sure. Sure. So then you started discussing wedding plans and he said let me get through the wedding and then I'll try to quit?
A Yes, sir, another excuse.
Q And he was always really trying to put off that situation of trying to quit, wasn't he?
A I don't think just him, but I think most smokers do that.

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2431

Q Yes, ma'am, but I'm only asking you about your husband, Mr. Carter. That's the only one I'm interested in right now, okay?
A Okay
Q That's what he was always trying to do was to put off or forestall or delay the attempt to quit?
A Those two times he gave those excuses but after that he really did try to quit
Q Right And you'd have discussions with him from time to time after you were married and he kind of – he didn't want to hear it really, did he?
A No, I'm sure he didn't
Q He didn't want you bringing up the fact that you promised me you'd quit and you haven't quit, did he?
A Excuse me?
Q He didn't want you bringing up the fact in conversation that he had promised you he'd quit and he hadn't quit, did he?
A Well, I don't think most people want to be nagged or henpecked about anything
Q Sure And it was always you that would have to bring up the topic of quitting It was never Mr Carter who initiated the topic between the

Page 2432

two of you?
A Well, certainly it wouldn't have been him He was addicted to cigarettes and why would he bring it up
Q Okay So he never did bring up the topic of quitting smoking after you got married, did he?
A I'm sure there were times after we got married As a matter of fact, one of the times was the self-hypnosis clinic that he was going to. That was not my idea He had seen that in the paper and he had talked to some people at Jacksonville Center, and they told him that they had tried it and it was successful for them And so he said, I think I'll try this So, yes, he did bring it up
Q So back when we met last October that was just one of those episodes that you couldn't recall, but are there any others besides that? Any other time that you can recall between 1982 or -'3 and 1991 when Mr. Carter did quit that he brought up the subject of quitting as opposed to you having to bring up the subject of quitting?
A There could have been a time. I don't recall. I really doubt that he would have.
Q And the way it went was, as long as you were not bringing it up and just smiling and being

Page 2433

pleasant about it, everything was fine?
A Well, sure.
Q Okay. And he told you at some point, and maybe on more than one occasion, that he didn't want to quit smoking because he liked smoking and he enjoyed smoking, didn't he?
A Yes, he told me that
Q And you believed your husband, didn't you?
A I believed him when he said that, but I believed that it was an excuse because he was addicted to cigarettes and that he couldn't quit.
Q But in any event, you didn't doubt your husband was telling you the truth when he said that and you took him –
A Well, let me tell you what I used to say to him
Q I don't mean to interrupt you, ma'am, but you didn't disbelieve him, did you?
A Yes, I did.
Q You did? Okay Did you tell him that --
A Yes
Q – that, Grady, you're lying to me?
A I didn't tell him that he was lying to me But I said, if you will let me state what I said, that I can't imagine that anybody could like

Page 2434

the taste of cigarettes because they stink and they taste bad
Q But Grady says, to me they may stink but they taste pretty good?
A Well, yes, that's one's opinion
Q Sure And that's all --
A I was stating mine I couldn't speak for him
Q And often when you-all would have these discussions about his quitting where you would bring it up, he would go out in the garden and tend to his roses, wouldn't he?
A Sure, he would
Q And he would do that, in your view, so he wouldn't have to face the situation?
A No, I don't believe that's why he was going out there We would have an argument about it and I would say some things that were very hurtful to him. And I'm sure that after something like that you wouldn't want to just hang around in the same room with somebody and have to look at them and them look at you. So, you know, that was, I just assume, an escape, not necessarily to smoke a cigarette because he was smoking in the house at the time So he didn't have to go out in the yard where the roses

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Document from the Industry Documents Library at https://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2435

were to do that.
Q Sure. It was only the last year, I guess, before he quit smoking – it was only that last year that he stopped smoking in the house and in the car –
A That's correct.
Q – and would smoke outside, right?
A That's correct.
Q During that last year when he would not smoke in the house or in the car, the topic or the subject of his quitting never really came up?
A Oh, yes, it did.
Q Okay All right Well, let me ask you –
A Can I tell you about that?
Q Well, it did come up?
A Yes, it did
Q Okay Let me ask you about this then In addition to having discussions with Grady, you thought that those discussions would help him make a decision to quit smoking?
A I had hoped that they would, yes
Q Sure And you did other things, too, besides just discuss it with him, didn't you? For example, you would see an article in the paper or a magazine that discussed something about smoking and

Page 2436

you would cut that out and give it to him, wouldn't you?
A I didn't cut it out I recall there was a time there was something in the newspaper and I just took the newspaper and folded it over to where the article was and laid it on his desk and hoped that he read it, and I don't belief that he ever did
Q In other words, okay, you showed him some articles from time to time. Not every article you saw, I'm sure, but some articles, and put it there so he might read it and that might encourage him to make the decision to stop smoking?
A Sure I wanted him to quit very, very badly.
Q And sometimes in addition to the articles that you might see in the newspaper or in a magazine, there might be a show on television; and if it had to do with smoking and health and if he was there with you, you'd try to call that to his attention?
A I don't believe that it was a whole show about smoking. There may be something on the evening news about some report that had come out. And so sometimes, as you well know, that they show little clips about what's coming on next, and so I'd

Page 2437

say, well, good, this is something we ought to watch.
And so many times he would just – he's always in control of the channel changer. And so it's like, you know, we just flipped to the next channel so we don't have to watch that.
Q In other words, in your household he has a hand on the beeper –
A Channel switch, that's correct.
Q And if a clip was coming up or a brief segment that had to do with smoking and health that you would like him to watch, it was flipped off?
A That's correct.
Q And you felt that he flipped it off because he didn't want to hear that message?
A Sure.
Q Because he knew what the message was?
A Because he was addicted to cigarettes And, you know, if you have a habit like that and you just can't stop, well, you don't want to see one more thing about it.
Q Now, you heard a little bit, and I won't go into any great detail, about going to the Jacksonville Nicotine Withdrawal Clinic and that was something that you had recommended to him?

Page 2438

A Yes, I did
Q In fact, you found out where it was and had seen the ads And when you bought the new car you thought that would be a good time and a good reason to persuade him to try the program, didn't you?
A No, I don't really recall seeing the ads myself but I worked for a man at Independent Life that had gone there previous to that, and I saw him out in the hall one day and we talked about it I said I heard that you had quit smoking And I said, how did you quit? That's what he told me, that he had gone to the Nicotine Withdrawal Clinic
And so I asked him the information about it, and I believe he went and got the phone number for me So I called and made the appointment after Grady and I talked about it.
Q And that appointment happened to coincide with the day that you went to St. Augustine to pick up your car?
A I think so.
Q And on the way back from St. Augustine you got right off on State Road 13 and shot up to Kori Road or wherever it was in Mandarin and took him to the center, right?

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Document from the industrydocuments.ucsf.edu/docs/nzxl0001

Page 2439

A We had an appointment, and so –
Q Right.
A – yes, we went to the center after we picked up the car.
Q And it was the following week when your husband had gone on to work, and to your knowledge had not smoked any cigarettes between the treatment and returning to work Is that true?
A To my knowledge he had not
Q And your husband told you following that, did he not, that the clinic had called him several times in follow up to check on him, didn't he?
A I'm not sure if they called him several times I do know they called him, I believe, the day he went back to work
Q Did you have anything to do with that call or is that something they did on their own?
A No, they said the day that we were there that they would call and check on him
Q So it didn't surprise you to hear that they had called or tried to call your husband?
A No, not at all
Q He wasn't surprised by it, in fact, he would have expected it?
A No, he was there at the clinic He was

Page 2440

the one that went through the treatment, so they told him that they would call and check on him We were there together.
Q Right And then your husband told you that he had informed his secretary at the time – do you remember who that was, who his secretary was?
A Loretta Griffin
Q Okay, Ms Griffin, to tell the Nicotine Withdrawal Clinic people that he wasn't in?
A Yes
Q Now, let's get back to this Great American Smoke-Out. That was while you were still working at Independent, correct?
A Yes
Q And the Jacksonville Nicotine Withdrawal Clinic, that was before or after the Great American Smoke-Out?
A I couldn't tell you that.
Q You don't remember?
A I don't.
Q In any event, when you heard about the Great American Smoke-Out in '83, you knew that that was a well-publicized and annual event in Jacksonville?
A Oh, yes, it was It was, I think,

Page 2441

normally in the newspapers so I'm sure most people knew about it.
I will have to say though that I don't understand the program myself because really and truly what good would it do for somebody to quit smoking for one day and then start back the next day? It doesn't make sense to me, but certainly I encouraged him to do anything that I thought might help
Q So even though it didn't make a whole lot of sense to you as a nonsmoker why it would do any good, you felt that you would recommend it to Mr Carter?
A I don't believe that if I had been a smoker it would have made a whole lot of sense to me to just stop smoking for one day
Q But in any event, when you – you asked him if he would give it a try?
A Yes, I did
Q And when you asked him that he really didn't say anything, did he?
A I don't recall what he said at this time.
Q Do you recall what he did do?
A What he did?
Q Yes, ma'am.

Page 2442

A He met me for lunch that day and we went out for lunch
Q No, ma'am I'm talking about when you said, Mr Carter, however you said it, how about giving the Great American Smoke-Out a try?
A I think I recall what you're referring to I think he sort of laughed in a joking sort of way and probably thinking the same thing that – I can't testify to what he thought, but, you know, quit smoking for one day? I mean, get real
Q Well, the fact is he didn't say any of that, he just laughed, didn't he?
A I'm sure he said something. I couldn't tell you right now what he said. That's been a very long time ago.
Q All you recall about it then is that when you asked him or recommended that he try it, he just laughed?
A I suppose so.
Q Now, as of the last time you and I got together, Mr. Carter had never told you that he felt that he was addicted to Nicorette, did he?
A I don't recall
Q And he did tell you that he thought it might help calm his nerves Isn't that true?

http://legacy.library.ucsf.edu/tid/emt07a00/pdf
Support https://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2443

A I'm sure that he probably did say that.
Q Now, I assume that you would characterize your husband as a strong-willed person?
A Yes, he's very strong-willed.
Q And he's a positive, intelligent well-read person?
A Yes.
Q He's an informed person about current events?
A Yes
Q Since you've known him. He reads the Times-Union today and has done so ever since you've known him?
A He reads the Times-Union I can't tell you that he reads every article in there I don't think that he would have time to do that. Most people don't
Q Sure But he sits down or stands up or however he does it every day with the morning paper and has done that for as long as you-all have been married?
A Sure
Q Up to this day?
A Sure This morning he did it
Q Sure And he reads Reader's Digest,

Page 2444

doesn't he?
A He does read Reader's Digest, yes
Q And he also gets books that come through Reader's Digest from time to time?
A Yes
Q And --
A I think they're called the Book of Inside Information or something like that
Q And ever since you've known Grady he has expressed to you his belief or his knowledge that there is an association between cigarette smoking and various diseases, isn't that true?
A I don't know the answer to that.
Q Well --
A Ever since we've been married?
Q Yes, that's what I'm -- as long as you've known him.
A I don't know that he's really -- we've had a whole lot of conversations about what he knows about cigarette smoking. I've tried to tell him some of the things that I thought and there were conversations, many, many conversations and arguments about him trying to quit and when was he going to try again, but, you know...
Q But as far as anything that you may have

Page 2445

showed him or talked to him about about the hazards associated with cigarette smoking, to your knowledge you never told him anything about cigarette smoking that he didn't already know, did you?
A No, I don't know about that.
Q Did he ever express any surprise to you when you told him something about cigarette smoking that, Wow, that's really interesting, I haven't heard that before, anything like that? He didn't do that, did he?
A I don't know whether he did or not.
Q You don't recall if that ever happened?
A No, I don't.
Q Now -- we haven't got much longer to go You're doing fine
You've indicated to us or told us today that you would say things to him from time to time to indicate your displeasure with his smoking Is that true?
A That's true
Q And you're sure that some of the things you said to him may have even hurt his feelings?
A I'm sure that it did If you curl up to somebody's back in bed at night and you make the remark "tobacco road" or "you smell like a tobacco

Page 2446

factory," what would that make you feel like? Those were very hurtful things I'm sure to him, as well as they would be to anybody But I thought that that was maybe one thing that I could do or say that would maybe shock him in or just trying to quit smoking again or whatever
I tried -- as you've paraded in front of this court on your opening statements, I tried some of everything in the world and nothing worked because he was addicted to cigarettes and smoking.
Q You tried everything you could think of --
A Everything I could think of
Q -- to try and persuade your husband to make the decision to stop smoking?
A Yes, I did.
Q But you believed and you learned as you lived with Grady that just the possibility that his smoking might cause him some harm wasn't enough incentive for him to quit, was it?
A Incentive?
Q Yes, ma'am.
A I don't think that -- first of all, the information that he had, he certainly did not have any from you-all And he was reading things --
Q Yes, ma'am, I understand.

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Document from the Industry Documents Library at UCSF http://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2447

MR MAXWELL Objection, Your Honor Let her finish her answer.
MR. PRICHARD I move to strike, Your Honor, as nonresponsive. I don't want to argue with Mrs. Carter I asked a simple question.
THE COURT Repeat the question, please
MR. PRICHARD I'll try, Your Honor
Q You believe, based on your knowledge of Grady, your conversations with him to encourage him to quit smoking, your conversations with him about smoking and the risk associated with cigarette smoking, you believe that the possibility that he might get ill because of smoking cigarettes was not enough incentive to get him to stop smoking, was it?
A He tried many, many times to quit smoking And there were times whenever we would sit and have an argument -- he would be sitting in the lounge chair and I would go over and sit down on the arm of that chair and we would talk about it And I would say, Grady, do you want to die and leave me? Do you want our relationship to end?
Both of us, him included, would sit there and cry And he would say, yes, I really want to quit smoking I really know that it could harm my health But he said, I just can't quit.

Page 2448

Q But in any event, the possibility that his smoking may have harmed him wasn't enough to tip the scales to make him quit, was it?
A Sir, he was addicted and he could not quit
Q It was only when he believed that he had been harmed by his cigarette smoking that he quit Isn't that true?
A Let me tell you something· If someone ever tells you that you have lung cancer, you will be shocked into doing something that you never in your life thought you could do
Q Yes, ma'am.
A That is the biggest shock that you can ever go through. I can sit here and tell you that right now for both of us It's like death staring you in the face
Q Let me ask you a couple of questions about his many attempts to quit. Isn't it true that the only self-characterized serious attempt to quit that Mr. Carter made between the time you met him in 1991 is when he went to the Jacksonville Nicotine Withdrawal Clinic? Isn't that true?
A Is that the only serious attempt?
Q Serious attempt, by his words Not

Page 2449

yours By his
A No, sir, I don't believe that.
Q Okay
A There were many times whenever he took cigarettes, packages, ashtrays, cigarette lighters, just dumped it all in the garbage and he said, I am really going to try this time If that's not a serious attempt to quit, I don't know what is That's like throwing money in the garbage.
Q Yes, ma'am, it is And, in fact, you remember that happened on several occasions where Mr Carter would throw a pack of cigarettes or a half used pack of cigarettes away?
A Yes, many times
Q And he bought cigarettes typically by the carton, didn't he?
A Yes
Q And you don't recall ever, ever, ever Mr Carter throwing away a carton of cigarettes, do you?
A I believe there might have been one time. I'm not perfectly sure whether there was or not.
Q Yes, ma'am But back in October when I asked you that question, that very same question about throwing away a carton of cigarettes, you

Page 2450

couldn't think of anything like that, could you?
A I'm not sure
Q You can't think of a time today where he threw away a carton of cigarettes as opposed to a pack?
A No, I can't
Q Now --
A To tell you the truth, there were times whenever I did not know that he had thrown them away, he just told me that he did
Q Yes, ma'am
A So it could have been a carton, it could have been a package. I don't know It could have been a truckload.
Q You weren't monitoring those, is that right?
A Pardon me?
Q You weren't monitoring those cigarettes?
A I tell you what, if he told me that he was trying to quit, I was the happiest person in the world so it didn't matter how many it was.
MR. PRICHARD Yes, ma'am, I understand.
And I really appreciate your time. Thank you very much.
MR. MAXWELL No redirect, Your Honor.

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/nzxl0001

THE COURT Thank you very much, Mrs Carter. You may step down.

MR. WILNER. Your Honor, we are at a point in the case now where we do not have further live testimony. We do have some matters of evidence and some matters of housekeeping that we would take up.

In the interest of conserving time, may I suggest a short break where we can confer with opposing counsel, tell them exactly what we're putting on and see whether we have any disagreements I know we had our morning break, but we're just at that point in the case where it would be most helpful

THE COURT All right We'll take a recess until five after eleven Would that be enough time?

MR WILNER. Yes, sir

THE BAILIFF All rise This court is in recess until 11 05

(Jury out at 10 55 a m.)

(Change of reporters)

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Guide: http://www.industrydocuments.ucsf.edu/docs/nzxl0001

http://legacy.library.ucsf.edu/tid/emr07a00/pdf
Suggested: https://www.industrydocuments.ucsf.edu/docs/nzxl0001

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT IN
AND FOR DUVAL COUNTY FLORIDA

CASE NO. 95-0094-CA

DIVISION CV B

GRADY CARTER and
MILDRED CARTER,

Plaintiffs,

vs

BROWN & WILLIAMSON TOBACCO
CORPORATION as successor by
merger to THE AMERICAN TOBACCO
COMPANY

Defendant

PROCEEDINGS

August 1, 1996

VOLUME IX

Pages 2452 - 2517

INDEX

	Page
EXHIBITS	
Plaintiffs in Evidence	
No 19	2475
No 20	2478
No 21	2479
No 22	2480

PROCEEDINGS

Thursday, August 1, 1996 11 10 a m

(Jury absent)

THE COURT All right, gentlemen, do you want to advise me as to what progress, if any, you made

MR MAXWELL Yes, Your Honor, we have reached agreement with several matters, which are --

MR WILNER Well, we can go ahead We have a few brief arguments on some interrogatories and something to put in on advertisements And it might be appropriate to take up the interrogatories right now

THE COURT All right

MR MAXWELL You want to do this at the side bar? It might be easier

MR PRICHARD We have got only one copy Judge, do you mind?

(Side-bar conference)

MR MAXWELL Your Honor, Plaintiffs propose to read the defense interrogatory to No 1 of its supplemental response of Defendant to the Plaintiffs' fourth set of interrogatories And we have discussed narrowing the question subject to

their objection The question calls for advertising expenses of American Tobacco Company from 1945 through 1969, and the response as provided is on the schedule

The Plaintiffs offer this as evidence that consistent with Dr Feingold's testimony during the years in issue, especially in the earlier years, from approximately 1951 forward to about 1957, those are the years that we feel are most important for us, that these figures reflect that there was a large increase in the amount of advertising spent by American Tobacco Company which coincided with the publicity of the various scientific and medical publications which created a lot of publicity during the same time period

And I believe you may recall that Dr Feingold testified that one of the things the industry did in response to this publicity was to spend a lot more money on advertising to counteract it

MR RILEY Your Honor, we would oppose the admission of this information. We don't think that what was pertinent is the ads themselves. The figures, the dollar amounts that were spent on the advertisements is irrelevant I mean, I understand

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Digitized by the Internet Archive in 2014 http://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2456

that the advertising has come in in this case to show what the public was being told about smoking, and I think that's the reason that Your Honor has permitted discussion about advertising in the case But the amounts that were spent on the advertising is irrelevant

I mean, if there has been an increase in the advertisements, then that would be reflected in the ads themselves And I understand that they intend to seek to introduce those anyway, so I just don't think the numbers themselves are pertinent and, in fact, would be unfairly prejudicial to permit them

THE COURT It appears that what was told to the public is at issue It also appears that what was not told to them at this point in the trial is at issue I think that the budget is made relevant by the cross-examination of Dr Feingold as well as examination concerning advertising, its increases and decreases during the years in question, and I'm going to allow the evidence to come in

MR MAXWELL Thank you, Your Honor

The next item, we have three interrogatories here that are contention

Page 2457

interrogatories, answers to Nos 4 and 5 and 7

And the No 4 asks if they contend that the plaintiff was negligent in smoking too many cigarettes The answer was American does not contend that Grady Carter was negligent for smoking the amount of cigarettes that he decided to smoke

Similarly, Interrogatory No 5 asks if they contend that the plaintiff was negligent in his smoking procedures or practices And, again, the answer was American does not contend that he was so negligent

And the last is Interrogatory No 7, Do you contend that Plaintiff misused your product? If so, please identify all facts and evidence that support your contention The response to this was American does not contend that Mr Carter misused Lucky Strike cigarettes

We think at this point in this case there has been evidence which suggests to the jury that Mr Carter's conduct may have been responsible, may have been a cause of his injury And there were questions directed specifically as to how he smoked the cigarettes, how far down he smoked the cigarette down to the butt And we think in light of the conduct evidence that has been placed in issue in

Page 2458

this case that we should be able to read this evidence to the jury, so that they're not so contending that he has done anything wrong

MR PRICHARD Your Honor, if I might respond to that The only negligence in this case or allegations of negligence we have are The American Tobacco Company There is no claim -- there is no allegation of comparative negligence as to the defense in this case to tell the jury this is not a negligence case, this is not a contract case, this is not an assumption of risk case, this is not -- this simply confuses the issue

When the jury was charged on the law, they will not hear any questions about the Plaintiffs' comparative negligence, because it's not in the case This is injecting an issue that need not be injected, and it's improper to do so

And that -- the same goes to misuse of the product There's no contention here that Mr -- nor will there be any that Mr Carter misused the Lucky Strike cigarettes There will be no claim that he was negligent in that he smoked cigarettes or the amount that he decided to smoke And all it is -- and they have said it a couple of times, I think we objected at least once about the contentions of

Page 2459

negligence It's not an issue in this case No issue in the case If it was going to be an issue, we would have brought it, so what you are telling the jury is this is reinforcing the negative

Your Honor is going to instruct them on the law You are not going to instruct them that there is no claim that Mr Carter was negligent in this case by American Tobacco Company You're simply going to say claims in this case are Is the American Tobacco Company negligent or was their product defective for various reasons

So his negligence is not an issue, and I don't think we have objected to his negligence

MR MAXWELL Just briefly, Your Honor There has been a great deal of evidence that in the face of knowledge and information Mr Carter did something that led to his injury And we think although the words have not been used, there certainly is a very strong evidentiary suggestion that he has somehow done something that he shouldn't have done and that it is his fault And that's why we should be able to read this information

THE COURT Well, let me tell you the question that's bothering me I remember specifically on cross-examination Mr Riley asking

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2460

how far down did Mr Carter smoke the cigarette The inference from that is that if -- one of the inferences is that if he smoked it closer to the butt that he did something wrong And I'm bothered by that because it indirectly suggests that he's negligent

MR RILEY Your Honor, can I explain why I asked the question?

THE COURT Yes, sir

MR RILEY I asked Mr Carter that question because one of their claims in the case is that there should have been -- that American should have indicated to Mr Carter how far down the cigarette should have been smoked And I was merely addressing the claim they put in that we should have instructed him how far down to smoke And I was merely pointing out that there is no proof really that he did smoke the cigarette to a very short butt

So I was trying to address their claim I was not trying to suggest any fault in Mr Carter's part, nor would we do that in closing argument

THE COURT I understand that you weren't trying to suggest it The problem I have is that I think it's fairly inferable from the evidence in

Page 2461

this case the overlap between causation and negligence is one I've commented on earlier is real

MR PRICHARD Your Honor, may I chime in at this point? I think Mr Carter's response to that question was he didn't remember He didn't know Had he said, Well I smoked cigarettes I only smoked two puffs and put them down Then the argument could have been made, Well, he did not do -- or he didn't do what Plaintiffs say we should have told him to do That consists to establish a fact that they could have taken it out of the case, he says he doesn't know, so it's up in the air He can't say he smoked it down beyond the fine gold letter He can't say he didn't It hasn't been established that was negligence on his part It was merely asked to establish the fact or the absence of the fact and to read into that -- to weave into that the fact that somehow he was being charged with fault for that When we are contesting that it shouldn't have been done at all seems to be an inference at best

MR WILNER Mr Carter's fault has been gone through again and again, as we know But as to one -- this one issue of how he smoked, he said he was a compulsive smoker I don't know what

Page 2462

inferences can be drawn from that, but I think that the issue that the jury is entitled to hear is that he's not -- there is no charge that Mr Carter misused this product And I think that that's a fair --

THE COURT Well, actually I'll -- putting my concerns aside about negligence, I was going to overrule the objection to the interrogatory concerning misuse I don't think that injects into the case the idea that he was negligent, at least not on its face it doesn't

The other two, though, do, and I was trying to construct an interrogatory that would permit the answer to be given to -- without referencing negligence -- convey the sense that he -- for example, do you contend with regard to Interrogatory No 4 -- the example given was do you contend the Plaintiff smoked excessively or should have smoked less

The response is American does not contend that Grady Carter was negligent for smoking the amount of cigarettes he decided to smoke

MR WILNER If the word negligent was taken out and the answer was just no, American Tobacco does not contend Mr Carter smoked

Page 2463

excessively -- whatever the rest of it says And the reason I think that's admissible is because American Tobacco has communicated their position on what communications should have been given of their knowledge in this case is relevant in this case

I think that if we ask them, you know, are you saying that there's too much smoke? There's also indications in some of the documents about excessive smokers and things So I think this is important to clarify to the jury that there is not a claim or not a suggestion that American Tobacco's present position is that Grady Carter did not smoke excessively and whatever else it says I have forgotten

But I agree if the word negligence is taken out, it would be more meaningful to the jury anyway

MR PRICHARD Your Honor, may I borrow that for a moment? It appears to me then that if Your Honor is inclined -- that this was -- these interrogatories were propounded at a time when negligence was poised as a defense in this case It was not poised after that, it was dropped, number one

Number two, the answer, the complete

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Digitized by the Internet Archive in 2014 http://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2464

answer should be if part of it is going to be given, the complete answer should be given with respect to his awareness And what that does is we get into a hypothetical It's unfair to only use part of it and not use the other But by using the other part, the complete interrogatory, then it's enhancing what they say we're doing that we are not doing It should be stayed away from Negligence should be stayed away from

No one is going to stand up in this courtroom and say that Mr Carter was negligent or that Mr Carter was at fault If that happens, Your Honor, then we would be --

MR WILNER I guess the problem is, Your Honor, those were propounded true when the defense thought negligence was there It was withdrawn on the eve of the trial There was no time to propound more, so if --

THE COURT Let me say this, I think in reading the three proffered interrogatories, Interrogatory 7 concerning misuse fairly addresses both the amount as well as the procedures that would -- that would have been addressed by Interrogatories 4 and 5 And given that 4 and 5 do indeed raise the question of negligence, I think

Page 2465

that the clarity you're seeking to achieve can be achieved through the use of Interrogatory No 7 exclusively

So I am going to sustain the objection with regard to Interrogatory No 4 and 5 I'll overrule the objection with regard to Interrogatory No 7

MR MAXWELL Thank you, Judge

MR WILNER We are offering the composite of Lucky Strike advertisements taken from published journals They show what the journal and the date -- we started with his birthdate of 1930 There has been some testimony that ads even before he was old enough to read might have affected him or those of people around him And the ads are basically just a cross-section concerning Lucky Strike unfiltered cigarettes up through whatever the last year is, '62. I think they are self-authenticating statements of the party

MR RILEY Your Honor, I think testimony regarding the effect of advertisements that were run before Mr Carter was born or that were run when he was one or two years old is speculative in the extreme We just don't think that ads going back that far ought to be admitted, and I offer

Page 2466

Mr Wilner the compromise of 1940 and that's what I would suggest

MR WILNER Your Honor, he has -- I think there has been testimony that, you know, it's just really an interesting issue Let me digress The public's perception of cigarettes is on trial here in one way or another I mean, we, despite our attempts to not try it, I think the defense has certainly been trying it with reference to news periodicals and what people heard and said and what people's parents might have said, things like that

So what sows the seeds for public sentiment, what people remember, what they were told is an area that's, you know, hard for us to understand exactly, but we're not even seeking this proffer to put in all the advertisements of everybody, which would also go to the same issue, but these are statements by a party And a party's statements are, I think, are admissible unless there is no conceivable relevance to the party's statements

These are things that they said including inhalation It was never retracted In other words, having made the statement in this ad, which I have -- excuse me, let me read it because I always

Page 2467

forget

This ad says, Inhaling is most important to every smoker If this was said in 1930 to the world and was never retracted at some point in time, if it became, as our view, knowledge was available to American that inhalation was dangerous, then having made this statement and having it out there, it's certainly one of the things we can consider, did they continue to say it? Did they retract it? Did they say no, we've previously been of the position

I mean, this indicates at one time that this defendant was actively promoting the inhalation of its cigarettes Actually this is 1932 And it's a statement just like if they made in an ancient document You know, remember in the asbestos litigation, we used to see things the company said back in 1920, and if they indicated a position with respect to their product, they were in

That was their mentality at that time It's up to them to argue maybe it's not their mentality now Maybe that changed Okay

MR PRICHARD Your Honor, there is one additional point that everybody thought was in this case perhaps at one point, but it's not in this

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2468

case, and that is Mr Carter -- Mr Carter has testified here that he started smoking because Lucky Strikes -- because his aunt smoked Lucky Strikes Mr Carter testified that, I believe, he made reference to ads, subsequent to his becoming a regular smoker, that reinforce his choice or his desire to smoke or his decisions to smoke

So really it seems post-1947 in terms of Mr Carter is important, because that's what we're dealing with here We are not dealing with the general public That to me would seem to knock out all up until the time he became a regular smoker in this case

In some other case there may be testimony that experts might give that's not here to the effect that people who buy cigarettes buy them because of advertising But they don't even know they are buying it because of advertising, which is what the proposed expert said basically in this case That's not here

So the impact on Grady Carter, it seems to me, is what's important and his decisions based on advertising or lack of advertising and not -- because under Woody's theory anything that a tobacco company ever put in an ad from the 1890s to the

Page 2469

present, unless retracted, would seem to be fairly farfetched

It's no time to -- Mr Carter, he said he couldn't remember ads, as I recall how he said, maybe he said a few, but he certainly --

THE COURT Well, I remember the argument distinctly, Mr Prichard, that the duty owed by this company, and this was made by the company as I recall, was definable by what Mr Carter could have known and what they knew And I'm not sure that these aren't reflections of those I'm going to allow these in I think they are admissible

(Side-bar conference concluded)

MR MAXWELL Your Honor, we also have an agreement between use of medical records We are compiling a set that we are going to submit as a joint exhibit We'll rest without putting that in subject to that agreement.

MR PRICHARD That's correct, also holds to the mortality tables

MR WILNER That's right

MR MAXWELL We have one, but we are looking for it Do we have anything else?

(Discussion off record)

MR WILNER Sorry we are running around,

Page 2470

but we are getting there Your Honor, we are ready to proceed And we would, just for the court's information, we have three interrogatory answers, the exhibit that was previously marked, then we will rest and then, I guess, the jury can retire for lunch perhaps

THE COURT All right, Mr Forte, bring the jury in, please, sir

(Jury present)

THE COURT Please be seated Mr Wilner, offer your next item of evidence, please, sir

MR WILNER Your Honor, we would -- Plaintiffs would offer a composite exhibit of Lucky Strike advertisements from the 1930s through the 1970s, my next numbered exhibit

MR RILEY Are there anything from the '70s in there?

MR WILNER '60s, up to the '60s

THE COURT All right, it will be marked and admitted as Plaintiffs' No --

THE CLERK 18 Your Honor

THE COURT Over objection from the Defendant

MR WILNER Your Honor, we'd next like to read certain interrogatories that were answered by

Page 2471

American Tobacco and Brown and Williamson Tobacco Company in this case

THE COURT All right

MR WILNER Interrogatory No 6 question Do you contend that plaintiff inhaled too deeply or smoked the cigarettes down to too short a butt length or smoked too vigorously or blocked filter vent holes or in some other way smoked improperly? If so, please identify all facts and evidence that support your contention

The response American does not contend that Plaintiff inhaled too deeply or smoked the cigarettes down to too short a butt length or smoked too vigorously or blocked filter vent holes or in some other way smoked improperly

Interrogatory No 7 Do you contend Plaintiff misused your product? If so, please identify all facts and evidence that support your contention And the answer is American does not contend that Mr Carter misused Lucky Strike cigarettes.

Next is Interrogatory No 12 Identify any publications or statements you authored that directed -- I'm sorry -- you authored before the first of July 1969 that directed cigarette users to

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Guttenberg http://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2472

avoid inhaling too deeply or to avoid smoking an excessive amount or to smoke in moderation

The response is American is unaware of any such statements

MR MAXWELL Your Honor, Plaintiffs would also read the answer to Interrogatory No 1 of American Tobacco Company's fourth supplemental response to Plaintiffs' fourth interrogatories Interrogatory is For the years 1945 through 1969 inclusive provide the following information relating to your advertising and promotional efforts for your Lucky Strike cigarettes A, the advertising budget for each year

The response is Documents show the following expenditures for advertising for Lucky Strike unfiltered cigarettes Advertising expenditures for magazines were $923,000 in 1945, $1,014,000 in 1946, $1,574,000 in 1947, and $1,722,000 in 1948

In 1949, advertising expenditures were $1,130,000 for television, $5,331,000 for radio, $6,306 for print, and $14,000 for outdoor ads

In 1950, advertising expenditures were $2,687,000 for television, $5,404,000 for radio, $4,547,000 for print and $15,000 for outdoor ads

Page 2473

In 1951, advertising expenditures were 500 -- excuse me, $5,888,000 for television, $4,261,000 for radio, $4,823,000 for print and $186,000 for outdoor ads

In 1952, advertising expenditures were $7,797,000 for television, $2,762,000 for radio, $4,256,000 for print, and $376,000 for outdoor ads

In 1953, advertising expenditures were $8,213,000 for television, $2,440,000 for radio, $4,692,000 for print, and $401,000 for outdoor ads

In 1954, advertising expenditures were $7,435,000 for television, $1,400,000 for radio, $2,855,000 for print, and $154,000 for outdoor ads

In 1955, advertising expenditures were $6,081,000 for television, $788,000 for radio, $3,174,000 for print, and $8,000 for outdoor ads

In 1956, advertising expenditures were $7,361,000 for television, $811,000 for radio, $3,610,000 for print, and $27,000 for outdoor ads

In 1957, advertising expenditures were $5,961,000 for television, $462,000 for radio, $2,719,000 for print, and $13,000 for outdoor ads

In 1958, advertising expenditures were $6,035,000 for television, $1,190,000 for radio, $3,221,000 for print, and $485,000 for outdoor ads

Page 2474

In 1959, advertising expenditures were $5,629,000 for television, $337,000 for radio, $3,528,000 for print, and $460,000 for outdoor ads

In 1960, advertising expenditures were $5,725,000 for television, $1,740,000 for radio, $1,674,000 for print, and $551,000 for outdoor ads

In 1961, advertising expenditures were $7,171,000 for television and radio, $2,421,000 for print, and $401,000 for outdoor ads

In 1962, advertising expenditures were $7,629,000 for television and radio, $2,395,000 for print, and $186,000 for outdoor ads

In 1963, advertising expenditures were $8,141,000 for television and radio, $1,677,000 for print, and $166,000 for outdoor ads

In 1964, advertising expenditures were $6,185,000 for television and radio, $672,000 for print, and $10,000 for outdoor ads

In 1965, advertising expenditures were $383,000 for television and radio, $78,000 for print, and $6,000 for outdoor ads

Your Honor, I believe there is one item of evidence that the Plaintiffs have not yet moved into evidence, which was marked for identification yesterday

Page 2475

THE COURT Which is that?

MR MAXWELL If I may approach the clerk, it's the -- yes, this is it right here Your Honor, it's what has been marked for identification as Plaintiffs' Exhibit L

MR PRICHARD No objection, Your Honor

MR MAXWELL We would move that into evidence at this time, Your Honor

THE COURT What is it?

MR MAXWELL Excuse me, Your Honor, it is a --

THE COURT Is that the Nicorette?

MR MAXWELL Yes, Your Honor, it's the schedule of Nicorette purchases

THE COURT What year is that from, 1992?

MR MAXWELL From 1992 through --

THE CLERK It will be No 19, Your Honor

THE COURT Marked and admitted as Plaintiffs' 19

(Plaintiffs' Exhibit No 19 was received into evidence)

MR WILNER Your Honor, at this point we would like to publish the exhibits to the jury We also have one mortality table to read Maybe I should read that first

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Document from the industrydocuments.ucsf.edu/docs/nzxl0001

Page 2476

THE COURT Yes, sir
MR WILNER May it please the court.
From the Florida Statutes Annotated, the composite mortality tables of Table 7 for a male -- for a United States male age 66, five different estimates of mortality or life expectancy First estimate 10 54 years Second estimate, DIL years Third estimate, 12 31, 12 3 years Fourth estimate, 16 4 years, and last estimate, 143 years Just add, those are from different population studies
THE COURT All right, thank you, Mr Wilner
MR WILNER Thank you
THE COURT Mr Prichard, you want to be heard on --
MR PRICHARD Yes, Your Honor, if we could approach the side bar
(Side bar, Court and counsel)
THE COURT All right, Mr Wilner, I understand you want to publish the last --
MR WILNER Last exhibit
THE COURT - last item of evidence offered into evidence
MR WILNER Where is that book of

Page 2477

advertisements? Here it is Thank you Now, Your Honor?
THE COURT Yes, sir
(Publishing exhibit to the jury)
MR PRICHARD Your Honor, the jury might be advised that, of course, they will have the opportunity to see all of those at the end, in case they are concerned this is their only chance to review it
THE COURT Yes, sir, well taken Lady and gentlemen, Mr Wilner has handed Plaintiffs' 17, is it, Mr Hyatt?
THE CLERK No 17 was -- no, sir, I believe it's No 18
THE COURT No 18 It is some advertisements for your consideration, that is for you to examine them at this point The procedure is called publishing evidence to the jury It's appropriate for that to occur now, but you need to also be aware when you retire for your deliberations that item of evidence, as well as others, will be available for your consideration
So take a moment now and look through it and when you're done, let us know
MR WILNER Your Honor, we have these

Page 2478

mortality tables for females that we move into evidence now, too
MR PRICHARD No objection
THE COURT That will be No 19, Mr Hyatt?
THE CLERK No 20, Your Honor No 19 is the pharmacy statement
THE COURT We would want to admit mortality tables as Plaintiffs' No 20
(Plaintiff's Exhibit No 20 was received into evidence)
MR WILNER Your Honor, at the time this evidence is being considered, there are some other ads that we would like to include in the publication These are the Exhibit 12 that we had talked about yesterday
THE COURT Let me see those, Mr Wilner These are not included in the --
MR WILNER There may be one overlap, but for the most part they're not
THE CLERK Is this Composite 2?
MR WILNER Composite 2
MR WILNER I believe the Lucky Strike ads do overlap, and the other ones, Your Honor, do not

Page 2479

THE COURT I think we have enough to publish right now, Mr Wilner
MR WILNER Yes, Your Honor
MR WILNER Your Honor, we are offering the Surgeon General's report previously marked as Exhibit K into evidence at this time
THE CLERK That will be Plaintiffs' No 21
THE COURT Mr Maxwell -- I'm sorry, Mr Prichard, do you need to be heard?
MR PRICHARD I was trying to think where we left it, Your Honor
THE COURT I'm going to mark it and admit it as Plaintiffs' 21 with the understanding that the complete Surgeon General reports or copies of them will be provided as well in conjunction with that exhibit
(Plaintiffs' Exhibit No 21 was received into evidence)
MR WILNER Your Honor, we are offering the male mortality tables that we read in but didn't offer yet
MR PRICHARD No objection, Your Honor
THE COURT Marked and admitted as Plaintiffs' No 22

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2480

(Plaintiffs' Exhibit No 22 was received into evidence.)

THE COURT Mr Forte, could you get that from the juror that has finished examining it

All right, Mr Wilner, does the Plaintiff announce rest at this time?

MR WILNER Your Honor, Plaintiffs Mildred and Grady Carter rest their case today against the Brown and Williamson Tobacco Company as successor to The American Tobacco Company Thank you, Your Honor

THE COURT Very good Lady and gentlemen, the Plaintiff has announced the conclusion of its case I do know that there are matters that I have to take up outside of your consideration And in light of that, you will be afforded a longer than normal lunch hour today I'm going to ask that you return to the courtroom at two p m We'll stand in recess as far as you are concerned until that time

I'll see counsel for purposes of the matters we need to consider at 12 15

(Jury exits at 12 05)

(Recess until 12 25)

THE COURT Mr Prichard?

Page 2481

MR PRICHARD Yes, sir

THE COURT You have matters you need to bring up?

MR PRICHARD We do, Your Honor, and if the court would permit, I would ask Mr Vollins to present our argument

THE COURT Very good

MR VOLLINS Thank you, Your Honor We prepared a written motion, Your Honor May it please the court

THE COURT Yes, sir

MR VOLLINS At this time the Defendant Brown and Williamson Tobacco Corporation, the successor by merger to American Tobacco Company moves for a directed verdict on nine separate grounds

Your Honor is familiar with some of these arguments We have made them in the past with regard to summary judgment motions And as to save time today, I will only argue three or four of them The others we'll put under submission based on our court papers that we file

THE COURT All right.

MR. VOLLINS First, I think the most significant issue in this case with regard to the

Page 2482

directed verdict motion, at least, is the statute of limitations issue Your Honor has heard argument on this in the past, and I think that based on the testimony that we have heard so far, it is clear that Plaintiffs' claims must be rejected as being time-barred under the Florida Product Liability Statute of Limitations

As Your Honor knows, you have to bring a claim within four years under the Florida Product Liability Law Plaintiffs' filed the suit on February 10,, 1995, that therefore the relevant date we have to look at is whether the suit was brought timely based on February 10, 1991, four years before they filed suit

The clock starts ticking under a statute of limitations claim from the time the facts given rise to the cause of action In other words, when the cause of action should have been discovered or when it was discovered by the Plaintiff

Here the testimony that we have heard so far and all the record evidence establishes that Plaintiff Grady Carter knew that he had lung cancer or suspected he had lung cancer prior to February 10, 1991, which is more than four years before he filed suit

Page 2483

The relevant inquiries under the Florida Product Liability Statute of Limitations is the plaintiff's state of mind, and I'll just cite one, Byington versus A H Robbins Company 580 F Supp 1517 1984 That's where it says the relevant inquiry is what the plaintiff knew You can only look to what the plaintiff knew Whether the plaintiff knew that he had been injured by a product or suspected that he had been injured by a product

Here we have that testimony There are two relevant dates in which we have that testimony in evidence on The first is February 4, 1991, when Mr Carter saw Dr Decker, and the second is February 5, 1991, when Mr Carter saw Dr Yergin

Dr Yergin testified with regard to the February 5, 1991, visit at his deposition Dr Yergin had testified that he thought at that point that Mr Carter knew that he had lung cancer Dr Yergin confirmed that testimony at trial last week His deposition was read back to him Mr Sheffler read Mr Yergin's testimony, and it said, But I think he was depressed, and I think he did feel that he probably had lung cancer, yes It was reasonable for him to make that conclusion

That's referring to the February 5, 1991,

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2484

visit to Dr Yergin?
And Dr Yergin responded, Yes, and I stand by that And if I can amplify that, what I mean by that, if you leave this text here for a second --
Mr Sheffler said, Sure.
And then Dr Yergin continued -- is Mr Carter had just lost a parent He was very concerned about death and dying And because of his concerns, he was worried that he might have lung cancer And that is correct, but I don't know whether he truly believed it or thought it was just a state of fear It was very difficult to tell And I'm not certain retrospectively that Mr Carter was even -- well, that's fine I mean, I stand by this He was concerned He was worried He was frightened as any patient with his symptom complex would be
This confirms that Mr Carter knew or at the very least suspected that he had lung cancer prior to February 10, 1991
There is further testimony from Mr Carter Mr Carter at pages 2300 and 2301 of his testimony confirmed what he had said at his deposition, that as of February 4, 1991, he felt in his mind that he had lung cancer

Page 2485

Now, Mr Carter went on to say during his testimony yesterday that he also thought that he may have had tuberculosis at that time He said, Oh, it may have been TB, it may have been lung cancer He wasn't sure But this does not excuse a plaintiff He said that he did not know for sure that he had lung cancer until the doctor diagnosed him, and that was after February 10, 1991, he says
But the clock does not start ticking when you get a doctor's diagnosis under Florida law The clock starts ticking when you know or you suspect As I said, Byington says it's the plaintiff's state of mind that matters
In fact, in Byington, they even made a mention of the fact that you don't have to wait for a doctor's confirmatory diagnosis They said at page 1517 in Byington that plaintiff is neither a physician nor a lawyer capable of understanding the medical or legal significance of the physician's comments is not decisive All that is necessary is that the information be made available to plaintiff so that he or she suspects that the product may have caused injury.
Certainly it has been established in the testimony to date that Mr Carter had that suspicion

Page 2486

by February 10, 1991 In fact, because suspicion is the standard in Florida, you impute to the plaintiff the knowledge of accessible medical records or medical information
And one of the cases that deals with this we have cited in the past is Doe versus Cutter Biological, 813 F Supp 1547, Middle District of Florida in 1993 It says, In the court's analysis, the knowledge available to the medical community must be imputed to the plaintiff since this knowledge would be similarly available to plaintiff upon the exercise of due diligence
Now, you may remember we have talked about this case in the past This was a case involving a product liability case against a manufacturer of blood product in the '80s, and the plaintiff had taken that blood product because he was a hemophiliac and had been -- he came down with the AIDS virus
Now, back in the '80s, people didn't quite know whether if you got the AIDS virus you would necessarily come down with AIDS And he wasn't quite sure And his argument was, Well, the clock shouldn't have started to run when I first got the transfusion of blood, because I didn't know then

Page 2487

that I would definitely come down with AIDS
But the court looked to the knowledge of the medical community And the court rationalized that if he had asked his doctor whether he would have come down with AIDS just because he had the AIDS virus, the doctor would have said, Yes, you are going to come down with AIDS
So the product liability statute of limitations began to run from the time that he had known or suspected that the product had caused him harm
University of Miami versus Bogorff, a Supreme Court case from the Florida Supreme Court 583 So 2d at 1000 says the same thing The contents of accessible medical records is imputed Therefore, the plaintiff had constructive knowledge about the cause of his injury and therefore his claims were time-barred
Now, let's look at what Dr Yergin said last week again Dr Yergin testified, it's at page 657 of the trial testimony, he said, If he said to me -- in other words if Mr. Carter said to me -- Dr Yergin, do you think it's more likely to be cancer than anything else? I would have said yes I mean, I'm not going to ever deceive a patient

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2488

In other words, Dr Yergin said that if Mr Carter had come to him and said, Do I have lung cancer, prior to February 10, 1991, Dr. Yergin would have said yes

Now, Dr Yergin also said that, Well, I don't like to scare patients, so therefore I don't tell them But he also said if Mr Carter had come and asked him that question, he would have said yes Based on Bogorff and based on the Doe case, that is enough for the statute of limitations to begin running

Dr Yergin also said that when he first met with Mr Carter on February 5, 1991, the first, second and third things that were in Dr Yergin's mind were lung cancer, lung cancer, lung cancer Again, that's at page 653 of Dr Yergin's testimony

There are also several medical records, and the contents of these medical records must be imputed to the plaintiff, Mr Carter There is a February 4, 1991, X ray report, and that X ray report concludes that Mr Carter had lung cancer

There is a February 5, 1991, intake form from Dr Yergin's office, and that intake form lists on it that Mr Carter has a lung tumor And that

Page 2489

information was provided by Dr Decker's office, another doctor that treated Mr Carter

But I think most significant perhaps is Dr Yergin's testimony describing his February 5, 1991, workup of Mr Carter And he read from his notes from that workup at his testimony last week And I'll just read it to you

Mr Sheffler said You said on February 5, 1991, that was the initial visit, right?

Dr Yergin answers. Yes

Question And how would you characterize what you diagnosed or did not diagnose on that day? Suggestive or --

Answer Well, the last page of my workup gives my impression I said number one was left upper nodule

Question. Upper lobe nodule?

Right

Question Okay.

Dr Yergin· And number two was COPD

Question Okay

Answer Number three was chronic bronchitis

Question. Okay

Answer by Dr Yergin· Number four was

Page 2490

cigarette abuse of approximately 65 pack years

Now, in this suit, Mr. Carter is also suing not just for lung cancer, but for COPD, chronic bronchitis and other injuries that he allegedly sustained as a result of cigarette smoking Based on Dr Yergin's testimony and this medical record, Mr Carter knew or suspected or at least had constructive knowledge that his claim began running prior to February 10, 1991

At the very least, Mr Carter cannot recover for his COPD and his emphysema and his chronic bronchitis, but Mr Carter also cannot recover for his lung cancer based on this record alone, because Florida does require that you know necessarily all the injuries that are caused by the product at the time, you just have to know that the product caused you some harm

And that was certainly established by the other testimony and the other records in the case, that there is constructive knowledge here as well as testimony by Dr Yergin and Mr Carter that the knowledge that Mr Carter had, the requisite level of knowledge that had the clock start running on the statute of limitations prior to February 10, 1991

The second area I'd like to address today,

Page 2491

and this relates to Plaintiffs' claims for design defect and failure to warn would be the proximate cause area Before I do that, I would just like to back up a second and talk about some basics

This complaint was filed against The American Tobacco Company, which manufactured Lucky Strike cigarettes when Mr Carter smoked Lucky Strike cigarettes from 1947 to 1972 The allegations in the complaint only discuss The American Tobacco Company

Paragraph 3 identifies the Defendant as a foreign corporation doing business in Florida Paragraph 4 raises the requisite jurisdiction allegation against American Paragraph 5 says that American was the company that designed, manufactured, advertised, marketed, and sold Lucky Strikes Paragraph 7 says that Lucky Strikes, when used as intended, cause various illnesses Paragraph 15 is the proximate cause paragraph that says that because Mr Carter smoked Lucky Strikes, he suffered the injuries that are alleged in the complaint And the remainder of the complaint raises negligence and strict liability claims against The American Tobacco Company

Now, if we take a step back and look to

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Document from the industrydocuments.ucsf.edu/docs/nzxl0001

Page 2492

see what are the essential elements of a product liability claim under Florida law, maybe the best place to turn is the West versus Caterpillar Tractor Company case, which seems to be the product liability case that seems to be the most cited from 1976 by the Florida Supreme Court And it talks about the essential elements of a product liability claim And it says that there has to be a relationship to the defendant with -- between the defendant and the product in question, and the product has to be defective, and that defect has to be the causal cause of the injury And the defect has to exist at the time that the product was in possession of the defendant

Now, what West basically holds and what another case, Diversified Products Corp versus Faxon, from the First DCA in 1987 holds that the question really boils down to whether the manufacturer placed the product on the market with some sort of defect

So we have to look to see whether American placed Lucky Strike cigarettes on the market between the years 1947 and 1972 with some sort of defect that was the proximate cause of Mr Carter's injury

Page 2493

Now, under Florida Product Liability Law, there are three different types of defects There is a manufacturing defect, which is not being alleged here In other words, there was a particular carton of cigarettes that had something wrong with it There is a design defect, saying that the way that the company made all of its products were somehow defective or all types of products were somehow defective And there is a failure to warn prong of a defect allegation and that's, You should have told me more information about the product

Plaintiffs here are raising claims based on both failure to warn and design defect

Now, we have to ask ourselves, what is the relevance of the merger between The American Tobacco Company and Brown and Williamson That happened decades after Mr Carter stopped smoking cigarettes made by The American Tobacco Company And Your Honor has ruled in several instances that conduct of Brown and Williamson is relevant to this case on an evidentiary ground

But when we look at it from the product liability point of view, plaintiffs have to establish that it was the defective product that The

Page 2494

American Tobacco Company put on the market between 1947 and 1972 that was the proximate cause of Mr Carter's injury

Now, here when we look at Plaintiffs' claims in that capacity, we see that they're largely inadequate to meet the basic requirements of a design defect claim under Florida law

Plaintiffs would have had to have established that there was some defect in the design of Lucky Strike cigarettes during the time that Mr Carter smoked them, and they have not done this

They have put on two expert witnesses There is Dr Yergin, who was talking about Mr Carter more on his treating capacity And there was Dr Feingold

Now, Dr Feingold was an expert in many, many areas He was an expert in addiction He was an expert in a company's conduct or internal documents, and he was an also an expert in pulmonology And I think he was an expert in some other areas as well, but he was not an expert with regard to the design and manufacture of cigarette products

He says in his deposition that he doesn't

Page 2495

know about the manufacture of cigarettes products He only knows about their affects

Now, Dr Feingold proposed a lot of alternatives He said, Oh, the company should have done this The company should have that The company should have done the other thing And for two or three days he proposed those alternatives, but he didn't mention how any specific alternative could have been implemented, and he did not mention, he did not testify, did not provide any testimony about how a specific alternative design could have avoided Mr Carter's injury

I think most telling was the testimony that Dr Feingold provided with regards to his complaint that Lucky Strike cigarettes were defective because they were unfiltered for the simple reason that they were unfiltered He said that after a certain point The American Tobacco Company shouldn't have manufactured unfiltered cigarettes. They should have only have manufactured filtered cigarettes

Well, there are two very large problems with this design defect theory First, is Dr Feingold's own informational statement He referred to this informational statement, I think,

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2496

for a total of five or six times during his testimony And just reading from this informational statement, he says that filters would not have been a better alternative design They would not have avoided the injury

On page -- it's in the middle of the insert somewhere He says, Danger Filters do not protect you Filtered cigarettes are cigarettes advertised as lower in tar and nicotine are not proven to be safer than regular cigarettes, and will not protect you from premature death and serious disease

Next line, he says, Danger Low-yield cigarettes do not protect you Low-tar or low-nicotine cigarettes may not be less dangerous than other cigarettes The dangers of cancer, cardiovascular disease and other diseases are not materially reduced when smoking low-yield cigarettes Smokers of low-yield cigarettes are in much greater danger from those conditions than nonsmokers It shows that there is no alternative design that American could have used by which Mr Carter could have avoided his injury

Manufacturing filtered Lucky Strike cigarettes, which American did anyhow, would not

Page 2497

have made a difference according to Dr Yergin They had not proved that element of their case with regard to Dr Feingold's assertion that American should have made only filtered products

There is another problem with Dr Feingold's line of testimony on the filtered versus nonfiltered point, and that there is nothing in the record There has been no testimony so far to establish that even if American had manufactured a more filtered version of Lucky Strikes and had not manufactured an unfiltered version, that Mr Carter would have used the filtered version In fact, filtered cigarettes were on the market when Mr Carter smoked the unfiltered Lucky Strike, and he didn't use them

But be that as it may, no one testified in this case that Mr Carter actually would have smoked a filtered cigarette And Your Honor is familiar with the Cipollone case, I know, and we talked about this issue a few days ago in chambers There was a claim in cigarette -- in Cipollone for a design defect And the claim was one of the plaintiff's experts got up on the stand and said, The design defect is you should have manufactured a cigarette, a palladium cigarette And if you had manufactured

Page 2498

that palladium cigarette, the risk of injury would have been significantly reduced.

Well, the court rejected on directed verdict, rejected this design defect theory Its rationale was that there was no evidence presented that Mrs Cipollone would have smoked this palladium cigarette and therefore there was no evidence put on that she could have avoided her injury if the alternative design was used And it rejected the design defect claim on that very ground

We have heard nothing about whether Mr Carter would have smoked the filtered cigarette And, in fact, I would say that the evidence deduced so far is to the contrary of that, because Mr Carter did smoke unfiltered cigarettes up through 1972

Now, I think in an attempt to bolster their design defect claim, plaintiffs somehow try to look to the Brown and Williamson documents And Dr Feingold's testimony was, Oh, well, when I looked through the Browning and Williamson documents, I discovered there was something known as the Strickman filter and that was a secret And that shows that based on the records I see that if you use the Strickman filter, you could have made a

Page 2499

safe cigarette

Well, the next day on cross-examination it was revealed that the Strickman filter was no secret There were newspaper articles about the Strickman filter There were magazine articles about the Strickman filter And, in fact, the Strickman filter was first announced back in the '60s, and then a few months later it was announced in the newspapers again that the Strickman filter didn't work

As Mr. Sheffler read to Dr Feingold, the Strickman filter was a total failure because when people tried to inhale on it, they were getting hernias That can't be an adequate alternative design They have to put on proof that there was some alternative and feasible -- there was a feasible alternative design that would have permitted Mr Carter to have avoided his injury

You can't just come in here and say, You shouldn't have manufactured cigarettes at all That's not an alternative design

Now, by analogy, I thought of this when Dr. Yergin gave his deposition testimony in this case a few weeks ago Dr Yergin said that there is no safe way to manufacture cigarettes He said,

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Digitized by the Internet Archive in 2014 https://archive.org/details/industrydocuments.ucsf.edu/docs/nzxl0001

Page 2500

Cigarettes are like guns No safe cigarettes, no safe guns

Well, that made me think to a few years ago when there was a rash of gun cases in Florida There were four reported decisions on these gun cases, and three of these courts rejected the gun cases And one court accepted the gun case And I would just like to contrast the three cases that rejected them with the one case that accepted it

The three cases that rejected the gun cases said, Well, you can't just come into court and say a handgun is defective You have to come in and say there was some alternative by which the injury would have been avoided A court of law can't decide whether all handguns are defective or not You have to have some safer alternative design by which the person would not have been injured And three of the four cases ruled that the gun case could not proceed on that ground.

Now, the fourth case, Your Honor is familiar with it because plaintiffs have cited it in the past to bolster their design defect theory, is the LeMaster case, LeMaster versus Glock from the First District Court of Appeals

Now, that case only permitted a gun case

Page 2501

to go forward because the plaintiffs did comply with the Florida Product Liability Law by saying that there was an alternative design by which the injury could have been avoided They said that a safety device should have been put on this particular gun that was used by police officers in Jacksonville And if the safety device had been put on, the person at issue, the plaintiff or the plaintiff's decedent would not have been shot because the police officer carrying the gun would not have been able to fire his gun They said that the gun was defective in that respect because there was a lack of a safety device, and the court permitted them to go to trial on that issue, because there was some evidence that the injury could have been avoided

Here there is no such evidence Our case is like the three other gun cases where there is no alternative design by which Mr Carter could have avoided his injury.

Plaintiffs' failure to warn claims also suffer for lack of proximate cause We have heard over the last two days a tremendous amount of information establishing that Mr Carter has known for a long time about the risks of smoking He read about these risks in newspapers He read about

Page 2502

these risks in magazines He got warnings from his doctors He was told in the '70s by his son who was a chiropractor that smoking caused lung cancer His son had even sent him pictures of smokers' lungs versus nonsmokers' lungs

He also saw antismoking commercials by the American Cancer Society in the 1960s He had seen the Bill Tallman advertisements, which we have seen twice now He also saw Yul Brynner advertisements

Mrs Carter also testified that she would warn Mr Carter all the time to quit smoking, and Mr Carter would -- I just jotted down these notes this morning -- Mr Carter would turn off the television when there were reports about smoking and health Mrs Carter said she tried everything in the world to get him to quit, but he didn't quit

Mr Carter even knew that one of three smokers die from smoking-related illnesses Now -- but I think most significantly is that Mr Carter saw the warnings He admits that he saw the warnings that were put on the packages by The American Tobacco Company since January 1, 1966 Mr Carter does not deny that he saw these warnings He saw them And he saw them in 1966 He saw them when they were changed in 1969, and he

Page 2503

saw them when they were changed in 1984 He saw them up until the time that he gave up smoking in 1991

Now, despite all of these warnings, Mr Carter never quit until he came down with lung cancer And when he was asked on cross-examination, he said, Well, it was only the shock of getting lung cancer that was able to motivate me to quit

And Mrs Carter earlier today said the same thing It was only the shock of lung cancer that got Mr Carter to quit smoking

Now, certainly manufacturers cannot be held to a crystal-ball standard under Florida law They cannot be required to predict, to tell their consumers that they will get a certain illness That cannot be the predicate of a failure to warn claim

Now, Mr Carter also testified today on redirect that, Well, maybe if I -- I should have been told these things by The American Tobacco Company He said, The American Tobacco Company should have put a skull and crossbones on packages of cigarettes that I bought There can be no failure to warn claim based on an allegation that a company should have told its consumer not to use a

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Guttenberg http://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2504

product That just goes to the heart of whether the product should be legal or not That can't be allowed

Mr Carter also said that, Well, they should have told me that there was a 2,000-to-1 greater chance of getting lung cancer if I was a smoker than if I was a nonsmoker Well, again, I don't understand how someone can say that they knew there was an 1-in-3 chance of dying from a smoking-related illness if you are a smoker Well, you should have told me there was a 2,000-to-1 greater chance

This is something that we mentioned in our summary judgment motion, Your Honor, that you cannot require -- Florida law does not require a manufacturer to constantly revise warnings to update consumers on recent epidemiological data You can't require manufacturers to warn, Okay, today the risk is one out of three Today the risk is one out of five Today the risk is two out of three That would be impossible The product liability laws just don't go that far

And in other cases courts have rejected similar theories A few years ago there was a rash of cases against the alcohol industry and people

Page 2505

came along and said, Well, we've always known that drinking was bad for you, and it can cause cirrhosis of the liver, and we always knew that if you drank too much you could become an alcoholic

But now in the 1980s, because of all of this recent scientific information, we are finding out that some people are genetically predisposed to alcoholism And, you know, Liquor company, you should have warned us about that We found these studies and you should have known about that years ago

And the courts have thrown these out There was an appellate court in Texas that accepted that argument and wouldn't dismiss the plaintiff's claim on those theories And the Texas Supreme Court reversed, it said it doesn't matter All you got to look to is whether the risk was generally known

Now, here we have a plaintiff who knew that one out of three smokers die from smoking-related illnesses Can he really come into court and say, Oh, well, you should have told me that it was a 2,000-to-1 greater chance, or it was a 5,000-to-1 greater chance, or it was a 1,000,000-to-1 greater chance That would require

Page 2506

manufacturers to basically put package inserts in all packages that are, you know, studies and the size of encyclopedias That cannot be the product liability law of Florida

Plaintiff also testified today a lot of things, he suggested that his -- he may have done things differently Well, to the extent that plaintiff may have said that he would have conducted himself differently, that's completly impermissible to support any failure to warn theory

The Drackett rule clearly says that a plaintiff cannot bolster his failure to warn claim by saying, Well, if you had told me this, I would have done -- I would have followed the instructions That is just not allowed And to the extent it is allowed, I think it is negated by Mr Carter's own testimony

Now, with regard to the Brown and Williamson documents And this is where we really have to look at the conduct of The American Tobacco Company You have to look about whether The American Tobacco Company failed to warn Mr Carter And Mr Carter is saying, Well, you should have revealed the results of those studies Those were done internally by Brown and Williamson in the

Page 2507

1960s, and you should have told me about those studies

Well, the fact of the matter is that Mr Carter did not smoke Brown and Williamson products in the 1960s He never regularly smoked a Brown and Williamson product From 1947 to '72, he smoked cigarettes manufactured by American American, of course, did not have knowledge of these particular studies There can be no proximate cause link between the failure to reveal these studies and Mr Carter's injury

Thank you, Your Honor

THE COURT Thank you, Mr Vollins

MR WILNER Your Honor, just very briefly since I believe many of these issues have been covered in extensive briefing materials before Your Honor Unfortunately I don't have all of those materials, which is probably a blessing And so I will not reiterate

I believe the state of mind of Mr Carter when he -- around those fateful days of the beginning of February has been explored perhaps more than any one state of mind should be explored, and I believe that it is a jury issue when he knew or should have known about the particular disease

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Document from the Tobacco Industry Documents Library at http://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2508

I also would note that it is interesting to hear the defendants make the case restricted to Lucky Strikes, which we have done, Lucky Strike cigarettes And nowhere is there any evidence saying that Mr Carter ever related anything he had wrong with him to those cigarettes as opposed to the cigarettes he smoked more recently

So even if whatever the defendants claims happened to Mr Carter, that link of the chain was never addressed, and it's a jury issue He could -- perhaps the jury may conclude that he was or should have been on notice that all of his cigarette smoking caused a diagnosis at the time Perhaps he would think that it was only the ones he smoked last year, I don't know

The question of diagnosis is covered in our memoranda A tentative diagnosis does not begin the running, nor is a patient on duty to interrupt his treatment or if he's in the midst of a diagnostic procedure, run to the courthouse with the preliminary idea that he might have something wrong with him

I think we did discuss all of those issues at great length, because really there is nothing new that has been presented, only the same deposition

Page 2509

testimony

On the issue of strict liability and warnings, I have to admit, I had a little trouble following the argument, Your Honor I will do my best In Florida, the plaintiff may, but is not required to present a feasible design alternative May but not required What the plaintiff is required to do is put on testimony from which reasonable people could agree or disagree that the product's risk outweighs its utility Or that the product -- that's the one test or the consumer expectation test is whether ordinary consumers, the product failed to perform as an ordinary consumer would expect Either one of those tests are part of the strict liability, which then, if they are -- that's established has to be linked with some approximate causation

The argument on design alternative is a way that the plaintiff may choose to go forward, in fact, we did, offering a design alternative including an actual warning, an actual package insert And also making, through Dr Feingold, the suggestions that certain design modifications or alternatives should have been done or at the very least investigated by American Tobacco, including

Page 2510

whatever you want to call, either the Strickman filter or something else

I think the defense counsel went way beyond the facts as construed most favorably to the plaintiff when he condemned the Strickman filter Whether that was good or bad, I think, is a jury issue And it certainly was only an example, as there were many others contained in the documents that were evidently being done at the time And since the product remained unchanged, we know that they were not incorporated

The issue of whether or not it is a defense to a defective product to have on the market some other product, which might not have that defect, I think has been well settled It is not a defense A defective -- that's the car without brakes In other words, you can't sell a car without brakes and say, Well, we are meeting our duty, because if the public wanted the brakes, they would go buy the brakes

On the issue of the skull and crossbones, that was -- the argument was made that a manufacturer does not have a duty to put a warning on saying don't use the product I haven't heard that before, and that's quite an interesting thing

Page 2511

I just had some intellectual interest in that, I'm sorry, but certainly the skull and crossbones may alert people If they decide not to use it, they may decide to use less, or they may decide to use it under only certain conditions, or they may decide to seek further information

So certainly I'm not aware of any cases that suggest that skull and crossbones cannot be a proper method of identifying danger I think the testimony about that was considerable

I think the other issues, Your Honor, are jury issues I've read through briefly the motions filed, and I feel, Your Honor, that for the most part they have been luckily or unluckily addressed in our memoranda that we filed earlier, especially these issues of whether -- what the effect of common knowledge is And certainly at this point, I think it's become a very open question what common knowledge is, even if that is relevant

But the rest of it, I think, Your Honor, would be contained in our pretrial briefing

MR VOLLINS Your Honor, may I have a minute to respond?

THE COURT Yes, sir

MR VOLLINS First, with regard to the

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/nzxl0001

Page 2512

statute of limitations, we are not requiring Mr Carter to delay his treatment or run to the courthouse Mr Carter had four years from the time of knowing or suspecting that he had been injured by cigarettes to bring his lawsuit

We are not saying that Mr Carter had to go out on February 4, 1991, or February 5, 1991, and bring his lawsuit The clock just starts running He had four years from that time So counsel clearly does not understand the statute of limitations

Also, with regard to directed verdict, what is there that the jury can really look to here? You're right, there is a lot about Mr Carter's state of mind, but what we know about Mr Carter's state of mind is ambiguous In his testimony at the deposition, he said, Dr Decker diagnosed my lung cancer Here he said today, Oh, Dr Decker didn't diagnose my lung cancer

At his deposition he said, I felt in my mind that I had lung cancer And then he says, Well, maybe it was TB maybe it was lung cancer It's ambiguous

Florida courts clearly, when the plaintiff's state of mind is at issue, the Florida

Page 2513

courts do not allow a jury to determine the plaintiff's state of mind Maybe they are allowed to have -- they are allowed to decide issues of fact from other instances or other witnesses, but when it's the plaintiff's state of mind at issue, we don't allow the plaintiff to bolster his own case by creating some sort of ambiguity or confusion on the record And that's what we have here And there are cases that say that in Florida

There is a First District Court of Appeals case, Williams v Duggan, directed verdict granted where -- yeah, directed verdict granted where the plaintiff's state of mind -- testimony about the plaintiff's state of mind was ambiguous There is another case that says the same thing from Florida

Plaintiff, you know, has contradictory testimony or ambiguous testimony And there is other testimony in the record establishing that the plaintiff knew or suspected or knew something, you can't let the jury decide You can't let the jury be better than Mr Carter on this point

Now, about counsel's other arguments, you know, I'm hearing the same arguments now that we heard a few weeks ago at the summary judgment hearing At the summary judgment hearing, he

Page 2514

responded to all of our summary judgment arguments by saying, Oh, please let me put on my proof I've got to put on my proof He accused me of applying the incorrect summary judgment standard He said that I was applying a New York summary judgment standard

Well, I'm sure that the standards in Florida cannot be that a plaintiff doesn't have to put on his proof when he presents his case to the jury They have, though, put on their proof about an alternative design

Now, the idea that you don't need an alternative design for risk utility claims, that is exactly what the gun cases hold In fact, a lot of other cases hold in Florida In a risk utility claim, you have to have an alternative design allegation, because if you don't, then you just have juries deciding, Oh, we don't like guns We are going to hold the manufacturer liable, or We don't like alcohol, so we are going to hold an alcohol distillery liable You can't have that

Now, his reference to a consumer expectation test, they dropped that claim at the summary judgment hearing We can't consider that claim That claim was dropped Thank you, Your

Page 2515

Honor

THE COURT Thank you, Mr Vollins

At this juncture, as you know, in the court's consideration of whether the prima facia cause of action under any of these series has been established, I am to view the evidence in a light most favorable to the plaintiff Given that view a motion for directed verdict is denied

We will resume proceedings with the defense case at two p m

(Change of reporters)

http://legacy.library.ucsf.edu/tid/emt07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/nzxl0001